UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3235.

E. SOHIER WELCH ET AL., Executors,

PLAINTIFFS, APPELLANTS,

v.

THOMAS B. HASSETT, Individually and as Former Acting Collector,

DEFENDANT, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (SWEENEY, J.) FEBRUARY 8, 1937.

TRANSCRIPT OF RECORD.

JOHN L. HALL,
CLAUDE R. BRANCH,
for Appellants.

JAMES W. MORRIS,
ASSISTANT ATTORNEY GENERAL,
SEWALL KEY,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,
ARTHUR L. MURRAY,
SPECIAL ASSISTANT TO UNITED STATES ATTORNEY,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

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E. SOHIER WELCH ET AL., EXECUTORS,
PLAINTIFFS, APPELLANTS,
v.
THOMAS B. HASSETT,
INDIVIDUALLY AND AS FORMER ACTING COLLECTOR,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 6469 LAW DOCKET.

E. SOHIER WELCH AND SYLVESTER BROWN, EXECUTORS OF THE WILL OF FRANK H. BEEBE, PLAINTIFFS,
v.
THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

WRIT.

MASSACHUSETTS DISTRICT, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods or estate of Thomas B. Hassett, individually, and as former Acting Collector of Internal Revenue for the District of Massachusetts, in our District of Massachusetts, to the value of one million five hundred thousand (1,500,000) dollars, and to summon the said Thomas B. Hassett, individually and as former Acting Collector as aforesaid (if he may be found in your district) to appear before our Judge of our District Court, next to

be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September, 1935. Then and there, in our said court, to answer unto E. Sohier Welch and Sylvester Brown, as they are executors of the will of Frank Huntington Beebe, late of Falmouth in said District, in an action of contract.

To the damage of the said E. Sohier Welch and Sylvester Brown as they are executors as aforesaid (as they say) the sum of 1,500,000 dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable ELISHA H. BREWSTER, at Boston, the seventh day of August in the year of our Lord one thousand nine hundred and thirty-five.

JAMES S. ALLEN, *Clerk,*
by JOSEPH A. DENGELESKI, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, MASS., August 10, 1935.

Pursuant hereunto I have this day attached a chip as the property of the within named Thomas B. Hassett, and later on the same day I summoned the within named Thomas B. Hassett to appear at court and answer as herein directed, by giving to him in hand, the said Thomas B. Hassett, Assistant Collector of Internal Revenue at Boston, Mass., a true and attested copy of and an original summons to this writ.

JOHN J. MURPHY, *United States Marshal,*
by JOHN P. CLAIR, *Deputy United States Marshal.*

The writ in this cause is dated the seventh day of August, A. D 1935, and was duly entered at the September Term of this court, A. D. 1935, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 10, 1935, the following Declaration was filed:

DECLARATION.

[Filed September 10, 1935.]

COUNT I. The plaintiffs say:

1. They are executors of the will of Frank Huntington Beebe, late of Falmouth, in the County of Barnstable in said District of Massachusetts, who died on November 20, 1932, leaving a will which was duly proved and allowed by the Probate Court of said Barnstable County on December 27, 1932. The plaintiffs were on the same day appointed executors of said will, qualified by giving bond and notice of their appointment as provided by law, and are still acting as such executors.

2. The defendant is a resident of Fitchburg in said District of Massachusetts and was from May 2, 1935, to July 8, 1935, duly qualified Acting United States Collector of Internal Revenue for said District.

3. This action arises under the laws of the United States of America providing for internal revenue and is brought by the plaintiffs, under Section 3226 of the Revised Statutes of the United States as amended, against the defendant individually and as former Acting United States Collector of Internal Revenue for the District of Massachusetts, to recover estate tax wrongfully and illegally assessed against the plaintiffs and collected from them by the defendant as Acting United States Collector of Internal Revenue as aforesaid, assuming to act under the Revenue Act of 1926 as amended by the Revenue Act of 1928, by the Joint Resolution of March 3, 1931, and by the Revenue Act of 1932, under the circumstances and in the manner hereinafter set forth, together with interest on the taxes so assessed and collected.

4. On or about November 14, 1933, the plaintiffs filed with the Collector of Internal Revenue for said District of Massachusetts the estate tax return, so called, Treasury Department Form 706, prepared by them in accordance with the provisions of the Revenue Acts, and regulations pertaining thereto, in force and applicable at the date of said Beebe's death. In Schedule E of said return the plaintiffs reported as items 2 to 6, both inclusive, five transfers, each

of amounts in excess of five thousand (5,000) dollars, made by said decedent during his lifetime, but the value of the property so transferred was not included by the plaintiffs in computing the total gross estate for the reasons, as stated in said return, that they believed and therefore averred that not one of said transfers was made in contemplation of death and that as a matter of law none of the transfers could be taxed on any other theory. As computed by the executors in said return the total gross estate amounted to three million two hundred fifty-five thousand seven hundred forty-eight and 59/100 (3,255,748.59) dollars and the total net tax (after proper credit for estate inheritance, legacy and succession taxes) to three hundred thirty-seven thousand seven hundred eighty-five and 72/100 (337,785.72) dollars, which tax was paid by plaintiffs to said collector at the time of filing said return.

5. On or about February 11, 1935, the plaintiffs received from the Commissioner of Internal Revenue a ninety day letter, so called, dated February 8, 1935, advising that a deficiency of seven hundred fifty-seven thousand two hundred five and 34/100 (757,205.34) dollars in federal estate tax liability had been determined, and that

> "In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926."

A copy of said letter, marked "Exhibit A", is annexed hereto and hereby made a part hereof. Almost all such deficiency resulted from the inclusion of the value of the property transferred as aforesaid, the balance of such deficiency having been caused by certain readjustments acceptable to the plaintiffs.

6. Said ninety day letter also advised the plaintiffs that, upon receipt of a waiver, five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars of the deficiency would be assessed, and that as the balance of the deficiency might be eliminated by credit for State estate, inheritance, legacy or succession taxes, opportunity would be afforded for the submission of evidence of the

payment thereof as required by Article 9 of Estate Tax Regulations No. 80. In order to save interest by expediting an early assessment of the deficiency, the plaintiffs executed and filed with the Commissioner of Internal Revenue on or about March 19, 1935, Treasury Form No. 890, waiver and consent to the assessment and collection of a deficiency in federal estate tax, in the sum of five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars, together with interest thereon as provided by law. A copy of said waiver, marked "Exhibit B", is annexed hereto and hereby made a part hereof.

7. On or about April 15, 1935, the plaintiffs received from the office of the Collector of Internal Revenue at said Boston a notice and demand for estate tax (Treasury Form 880) in the amount of five hundred fifty-six thousand two hundred sixty-three and 9/100 (556,263.09) dollars, of which five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars represented the deficiency in estate tax above referred to and forty-one thousand five hundred forty-four and 17/100 (41,544.17) dollars interest thereon; and on May 2, 1935, the plaintiffs paid the same to the defendant.

8. On May 31, 1935, the plaintiffs filed with the Collector of Internal Revenue at said Boston Treasury Form No. 843, claim for refund of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars, being so much of said deficiency and interest as resulted from the inclusion in the gross estate of the value of the property transferred as aforesaid, together with interest thereon as prescribed by law; and on or about June 1, 1935 the plaintiffs filed with the Commissioner of Internal Revenue in Washington, D. C., a duplicate original thereof. A copy of said Form 843 as so filed, marked "Exhibit C", is annexed hereto and hereby made a part hereof.

9. On or about June 11, 1935 the Commissioner of Internal Revenue rejected said claim for refund and by letter dated June 11, 1935, notified the plaintiffs that said claim for refund was rejected in its entirety. A copy of said letter, marked "Exhibit D", is annexed hereto and hereby made a part hereof.

10. Five transfers in trust reported by the plaintiffs as items 2 to

6, both inclusive, in Schedule E of said estate tax return were erroneously and wrongfully included by the Commissioner of Internal Revenue in the gross estate of said decedent in computing said estate tax. None of said transfers in trust were made by the decedent in contemplation of or were intended to take effect in possession or enjoyment at or after his death; nor did the decedent retain any power with respect to any of said transfers in trust, nor were any of said transfers in trust subject to any right retained by the decedent to alter, amend or revoke the same or to designate the persons who should possess or enjoy the property or the income therefrom. Insofar as the decedent retained any right to the income from any of the property so transferred in trust,—or any possibility of the possession or enjoyment of such property,—as in the case of the trust dated February 13, 1924, and reported as Item 3 in said Schedule E,—such property (the said trusts having been created prior to March 3, 1931) can not properly be included in the decedent's gross estate under any proper construction of Section 302 (c) of the Revenue Act of 1926 as amended. Moreover, if said Section 302 (c) is capable of being construed so as to require or permit the inclusion, in the decedent's gross estate, of any of such property so transferred in trust the said section so construed is invalid and void as being repugnant to and in contravention of the Constitution of the United States and particularly of Article V in amendment thereof; and the action of said Commissioner in including such property in the gross estate of the decedent and in computing and levying an estate tax thereon and the action of the defendant in collecting an estate tax thereon deprived the plaintiffs, as executors as aforesaid, and said estate of Frank H. Beebe, of property without due process of law, in violation of said Constitution and particularly Article V in amendment thereof.

Wherefore, the plaintiffs say that the defendant has illegally collected from them the sum of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars, contrary to the provisions of the applicable revenue act, and that the defendant owes the plaintiffs said sum plus interest at six percent per annum from May 2, 1935, until the same is repaid.

COUNT II. The plaintiffs say that the defendant owes them the

sum of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars plus interest at six percent per annum from May 2, 1935, for money received by the defendant to the plaintiffs' use.

By their Attorneys,

JOHN L. HALL,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART,
HENRY HIXON MEYER,
EDWARD C. THAYER,
ROCKEMAN, SAWYER & BREWSTER,

W. B. M.

EXHIBIT A.

MT–ET–C1–10301—Massachusetts Estate of Frank H. Beebe
Date of death—November 20, 1932

Feb. 8, 1935

E. Sohier Welch, et al., Executors, 73 Tremont Street, Boston, Massachusetts.

Sirs: A deficiency of $757,205.34 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING, Commissioner

By D. S. Bliss, Deputy Commissioner

Enclosures: Statement, Waiver, Form 890.

The estate's protest is directed (1) to the inclusion in the gross estate of $9,470.14 for accrued interest on bonds in default (2) the inclusion of $18,816.91 cash under Item 6 "Schedule E", and (3) the inclusion in the gross estate of the transfers of property reported in Schedule E of the return. Additional deductions were also claimed for miscellaneous administration expenses. In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926. As a result of the protest, the following adjustments are made:

Gross Estate

Stocks and Bonds	Returned	Tentatively Determined	Determined
Interest on bonds in default	0.00	$9,470.14	0.00
Transfers			
Item 6	0.00	$2,399,035.50	$2,381,918.59

	Deductions		
Miscellaneous administration expenses	$43,778.53	$27,113.05	$43,342.11

The foregoing adjustments are reflected in the following summary:

Gross estate	$3,255,748.59	$5,904,541.41	$5,877,954.36
Deductions (1926 Act)	563,861.45	549,531.19	565,760.25
Net estate (1926 Act)	$2,691,887.14	$5,355,010.22	$5,312,194.11
Net estate (1932 Act)	$2,741,887.14	$5,405,010.22	$5,362.194.11
Gross tax (1926 Act)	$204,607.59	$556,751.53	$550,329.12
Credit for State estate, inheritance, legacy, or succession taxes	163,686.07	197,776.88	197,776.88
Net tax (1926 Act)	$40,921.52	$358,974.65	$352,552.24
Total gross taxes (1926 and 1932 Acts)	$501,471.79	$1,307,753.58	$1,292,767.94
Gross tax (1926 Act)	204,607.59	556,751.53	550,329.12
Net additional tax	$296,864.20	$751,002.05	$742,438.82
Net tax (1926 Act)	40,921.52	358,974.65	352,552.24
Total net tax	$337,785.72	$1,109,976.70	$1,094,991.06
Deficiency		$772,190.98	$757,205.34

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals $514,718.92 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations No. 80. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six percent per annum from one year after the decedent's death to the date of assessment,

or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT B.

WAIVER OF RIGHT TO FILE PETITION WITH THE UNITED STATES BOARD OF TAX APPEALS AND CONSENT TO ASSESSMENT AND COLLECTION OF DEFICIENCY IN ESTATE TAX.

MT-ET-C1-10301 District of Massachusetts

Pursuant to the provisions of Section 308 (d) of the Revenue Act of 1926, the undersigned executors of the estate of Frank H. Beebe waives the restrictions provided in Section 308 (a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in estate tax in the sum of $514,718.92, together with interest thereon as provided by law.

By executing and filing this waiver, we do not admit the propriety of the deficiency which has been asserted. We execute and file this waiver merely to save payment of interest by expediting an early assessment of the tax.

We hereby expressly reserve our rights to file claims for refund and, without limiting the generality of the foregoing, specifically to file a claim for refund of so much of the alleged deficiency referred to above as is based upon the inclusion in the gross estate of the decedent of certain transfers made by him during his lifetime.

E. SOHIER WELCH
SYLVESTER BROWN
Executors

Date March 15, 1935. 73 Tremont Street, Boston, Mass.

NOTE.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your estate tax liability as indicated above.

EXHIBIT C.

CLAIM

To be Filed with the Collector where Assessment was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Massachusetts
County of Suffolk, ss.

Name of taxpayer or purchaser of stamps E. Sohier Welch and Sylvester Brown, Executors of the will of Frank Huntington Beebe, Business address 73 Tremont Street, Boston, Mass.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Massachusetts
2. Period (if for income tax, make separate form for each taxable year) from , 19 , to 19
3. Character of assessment of tax Estate tax
4. Amount of assessment, $556,263.09; dates of payment May 2, 1935
5. Date stamps were purchased from the Government
6. Amount to be refunded $553,818.94 with (interest from date of payment as provided by law.)
7. Amount to be abated (not applicable to income or estate taxes)
8. The time within which this claim may be legally filed expires, under Section 810 of the Revenue Act of 1932, on May 2, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

On February 13, 1924, three transfers by deeds of trust were made by the said Frank H. Beebe, and were reported by the deponents as

Items 2, 3 and 4 in Schedule E of the return (Form 706) filed by them in the Massachusetts District on November 14, 1933; another transfer by deed of trust was made by said decedent on March 5, 1924, and was reported as Item 5 in Schedule E of said return; and a fifth transfer by deed of trust was made by said decedent on October 22, 1926, and reported as Item 6 in Schedule E of said return. Frank H. Beebe died on November 20, 1932.

The Commissioner of Internal Revenue, in a ninety-day letter dated February 8, 1935, addressed to the deponents, advised them that "In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926".

Said ninety-day letter also advised the deponents that the Bureau had determined that the value of the property transferred by the five deeds of trust was $2,381,918.59; that the value of the gross estate of Frank H. Beebe was $5,877,954.36; that a deficiency estate tax of $757,205.34 was due thereon; that $514,718.92 of the deficiency, together with interest accrued thereon, would be assessed; and, as the balance of the deficiency might be eliminated by credit for state estate, inheritance, legacy or succession taxes, an opportunity would be accorded for the submission of evidence, required by Article 9 of Estate Tax Regulations No. 80, showing payment of such taxes.

On April 12, 1935, a deficiency of $556,263.09 was assessed by the Treasury Department, which included $514,718.92, the principal amount of the deficiency above referred to, together with $41,544.17 as interest thereon, which deficiency was paid by the deponents on May 2, 1935.

The deponents hereby claim the right to a refund of $553,818.94 being that part of the alleged deficiency which was assessed and paid upon the value of the property included in said five transfers made by Frank H. Beebe prior to his death and referred to above, with interest from date of payment as provided by law.

Your deponents contend that these transfers were not testamentary in character, and were not made by said Frank H. Beebe "in contemplation of or intended to take effect in possession or enjoyment at

or after his death" within the meaning of Section 302 (c) of the Revenue Act of 1926; and that if they were within the meaning of said provisions of Section 302 (c) of the Revenue Act of 1926, said provisions, as applied to said transfers, are invalid and void as they conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to said transfers, would deprive your deponents and the Estate of Frank H. Beebe of property without due process of law.

Your deponents contend that the property included in said transfers could not legally be included in the gross estate of the decedent under any applicable provisions of law, and that if any provisions of any statute purport to authorize the inclusion thereof, such provisions are invalid and void, as they conflict with the provisions or Article V of the Amendments to the Constitution of the United States, inasmuch as such provisions, if applied to said property, would deprive your deponents and the Estate of Frank H. Beebe of property without due process of law.

E. SOHIER WELCH
SYLVESTER BROWN
Executors

Sworn to and subscribed by the said Sylvester Brown before me this 17th day of May, 1935.

Eleanor S. Muir,
Notary Public.

My commission expires Apr. 6, 1939.

German Reich State of Bavaria
Consulate General of the United
States of America at Munich
City of.

Consulate General of the United States of America, ss.

Sworn to and subscribed by the said E. Sohier Welch, before me, this 3rd day of May 1935.

J. M. BOWCOCK
JAMES M. BOWCOCK
Vice Consul of the United States of America
at Munich, Germany

Fee No. 45 Service No. 1017 $——— U. S. Currency no rec

EXHIBIT D.

Henry H. Meyer, Attorney at Law,
c/o Rackemann, Sawyer and Brewster,
53 State Street, Boston, Massachusetts.

ME–ET–C1–10301—Massachusetts June 11, 193:
Estate of Frank H. Beebe
Date of death—November 20, 1932

E. Sohier Welch, et al., Executors, 73 Tremont Street, Boston, Massachusetts.

Sirs: The Bureau has examined the claim filed by you on June 1, 1935, on behalf of the above-named estate for refund of $553,818.94 Federal estate tax paid under the Revenue Acts of 1926 and 1932.

The claim arises in connection with the following items:

Gross Estate

Transfers	Returned	Tentatively Determined	Determined
Items 2 and 5	$ 0.00	$ 114,691.33	$ 114,691.33
Item 3	0.00	21,489.87	21,489.87
Item 4	0.00	88,250.31	88,250.31
Item 6	0.00	2,381,918.59	2,381,918.59
Total	$ 0.00	$2,606,350.10	$2,606,350.10

A review has been made of the record in this case and of all the evidence submitted and the Bureau holds that all the property listed under the above schedule is subject to Federal estate tax under the provisions of Section 302 (c) of the Revenue Act of 1926 since the transfers were testamentary in character and were made in contemplation of death and to take effect in possession or enjoyment at or after the date of the decedent's death.

In view of the above and since there appears to be no over-assessment of tax in this case, the claim for refund is rejected in its entirety. Respectfully,

GUY T. HELVERING, Commissioner
By D. S. Bliss, Deputy Commissioner

At the same term, to wit, October 1, 1935, an answer was filed.

Also at the same term, to wit, October 8, 1935, the following Waiver of Jury Trial was filed:

WAIVER OF JURY TRIAL.

[Filed October 8, 1935.]

It is hereby agreed by the parties hereto that trial by jury is waived.

JOHN L. HALL,
Attorney for the Plaintiff.

FRANCIS J. W. FORD,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued to the December Term, A. D. 1935, when, to wit, February 14, 1936, the following Defendant's Amended Answer was filed by consent:

DEFENDANT'S AMENDED ANSWER.

[Filed by Consent February 14, 1936.]

Now comes the defendant in the above-entitled action and for his amended answer to the declaration on file herein admits, denies and alleges as follows:

1. The defendant admits the allegations contained in paragraph 1 of the plaintiffs' declaration.

2. The defendant admits the allegations contained in paragraph 2 of the plaintiffs' declaration.

3. The defendant denies that the estate tax referred to in paragraph 3 of the plaintiffs' declaration was wrongfully or illegally assessed against the plaintiffs and wrongfully or illegally collected from them by the defendant.

4. The defendant admits the allegations contained in paragraph 4 of the plaintiffs' declaration, but denies the plaintiffs' allegations in said paragraph that "not one of the said transfers was made in contemplation of death and that as a matter of law none of the transfers could be taxed on any other theory".

5. The defendant admits the allegations contained in paragraph 5 of the plaintiffs' declaration.

6. The defendant admits the allegations contained in paragraph 6 of the plaintiffs' declaration.

7. The defendant admits the allegations contained in paragraph 7 of the plaintiffs' declaration.

8. The defendant admits the allegations contained in paragraph 8 of the plaintiffs' declaration, but specifically denies the allegations contained in the copy of Form 843 marked "Exhibit C", which is annexed to and made a part of said declaration.

9. The defendant admits the allegations contained in paragraph 9 of the plaintiffs' declaration.

10. The defendant denies each and every allegation contained in paragraph 10 of the plaintiffs' declaration.

11. The defendant expressly alleges that the five transfers in trust reported by the plaintiffs as items 2 to 6, both inclusive, in Schedule E of the estate tax return were made in contemplation of death and intended to take effect in possession or enjoyment at or after death under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended, and that the property purported to be transferred by said purported trusts, items 2 to 6, both inclusive, should be included in the gross estate of the decedent.

12. The defendant alleges that on February 13, 1924, the decedent created a trust to transfer certain property comprising the same property covered by the purported transfer in trust under date of October 22, 1926, reported as item 6 in Schedule E of the plaintiffs' estate tax return, and that said transfer of trust of February 13, 1924, was made in contemplation of death and intended to take effect in possession or enjoyment at or after death under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended.

13. In the alternative, the defendant alleges that each of the two purported transfers in trust dated February 13, 1924, and October 22, 1926, comprising the property reported by the plaintiffs in item 6 of Schedule E of the estate tax return, was void and ineffective to transfer the property covered therein, and that said property remained

the property of the decedent and should be included in his gross estate.

14. The defendant alleges that, in any event, the purported transfers in trust reported by the plaintiffs as item 2 to 6, both inclusive, in Schedule E of the estate tax return and the transfer in trust dated February 13, 1924, comprising the same property purported to be transferred by the trust dated October 22, 1926, and reported as item 6 in Schedule E of the said estate tax return, are each and all subject to the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by the Act of March 3, 1931, and that the property covered by each and all of said purported transfers in trust should be included in the gross estate of the decedent under said section of the statute, as amended.

15. The defendant denies that it is indebted to the plaintiffs in any sum whatsoever for money received by the defendant to the plaintiffs' use.

16. The defendant denies each and every allegation contained in the plaintiffs' declaration not heretofore specifically admitted.

Wherefore, the defendant requests that the declaration of the plaintiffs be dismissed and that the defendant recover his costs and disbursements incurred in this proceeding.

By his Attorney,

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

No objection to filing.

CLAUDE R. BRANCH,
Attorney for Plaintiffs.

February 17, 1936.

At the same term, on the twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth days of February, A. D. 1936, said cause came on for trial without a jury, the Honorable George C. Sweeney, United States District Judge, sitting.

On the said twenty-eighth day of February, A. D. 1936, a defendant's motion for judgment was filed.

This cause was thence continued from term to term to the June Term, A. D. 1936, when, to wit, July 20, 1936, said cause came on for further hearing, the Honorable George C. Sweeney, United States District Judge, sitting as aforesaid, findings and rulings being made by the court, to which exceptions of both parties were saved.

On the said twentieth day of July, A. D. 1936, a petitioners' motion for judgment and defendant's motion for judgment were denied by the court, exceptions of the respective parties being saved.

Also on the same day an opinion of the court was announced.

This cause was thence continued to the September Term, A. D. 1936, when, to wit, September 12, 1936, a plaintiffs' bill of exceptions was filed within extended time.

On the thirtieth day of November, A. D. 1936, amendments to plaintiffs' bill of exceptions were filed and allowed.

On the said thirtieth day of November, A. D. 1936, the aforementioned plaintiffs' bill of exceptions was allowed by the court.

This cause was thence continued to the present December Term, A. D. 1936, when, to wit, February 2, 1937, the following Stipulation as to Computation of Judgment is filed and approved:

STIPULATION AS TO COMPUTATION OF JUDGMENT.

[Filed February 2, 1937.]

The parties hereto, without waiving any contention heretofore made or any right to appeal which either of them may have, hereby agree that the amount of judgment for the plaintiffs to be entered is $54,364.64, with interest from April 12, 1935, this being the amount which should be refunded under the decision of the District

Court and allowing the plaintiffs the maximum credit for state taxes to which they would be entitled on the basis of that decision.

E. SOHIER WELCH AND
SYLVESTER BROWN,
Executors of the Will of
Frank Huntington Beebe,
by their Attorneys,
JOHN L. HALL,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Approved 2–2–37. GEO. C. SWEENEY.

On the eighth day of said February, A. D. 1937, the following Plaintiffs' Motion for Entry of Judgment is filed and allowed:

PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT.
[Filed and Allowed February 8, 1937.]

Now come the plaintiffs in the above-entitled cause and move for the immediate entry of judgment.

By their Attorneys,
JOHN L. HALL, R.,
CLAUDE R. BRANCH, R.,
CHOATE, HALL & STEWART.

2–8–37. GEO. C. SWEENEY

Thereupon, to wit, February 8, 1937, it is considered by the court on the finding of the court, the Honorable George C. Sweeney, District Judge, sitting, that the said E. Sohier Welch and Sylvester Brown, plaintiffs, recover of Thomas B. Hassett, individually and as former Acting United States Collector of Internal Revenue for the District of Massachusetts, defendant, the sum of fifty-four thousand

three hundred sixty-four dollars and sixty-four cents ($54,364.64) damages, together with the sum of five thousand nine hundred forty-three dollars and eighty-seven cents ($5,943.87), interest from April 12, 1935, as computed in stipulation, and their costs of suit taxed at

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OPINION.

July 20, 1936.

[15 Fed. Supp. 692.]

SWEENEY, J. This is an action at law to recover estate taxes alleged to have been illegally assessed and collected. The plaintiffs are the executors of the will of Frank H. Beebe, who died on November 20, 1932. The will of the decedent, under which the plaintiffs were named as executors, was duly proved and probated on December 27, 1932.

Five trusts which were set up by the decedent during his lifetime were declared by the Commissioner of Internal Revenue to have been testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment at or after the death of the decedent. It would follow that under Section 302 (c) of the Revenue Act of 1926, the value of these trusts should have been included in the gross estate of the decedent subject to estate tax. As a result of the finding of the Commissioner of Internal Revenue, the gross estate of the decedent was determined to be $5,877,954.36. The net estate was determined to be $5,312,194.11, resulting in a total estate tax of $1,094,991.06 after the allowance of certain credits. On this computation a deficiency of $757,205.34 was determined, of which $514,718.92 principal and $41,544.17 interest were paid on May 2, 1935. The balance of the deficiency, namely, $242,486.42, has been withheld from assessment in view of the instant litigation, and in order that the executors might have an opportunity to claim further credit for State inheritance tax payments.

On May 31, 1935, the plaintiffs filed with the Commissioner of Internal Revenue a claim for refund in the amount of $553,813.94 on the ground that the five transfers declared by the Commissioner to have been testamentary in character, made in contemplation of death, and to take effect in possession or enjoyment after the death

of the decedent were not such either in fact or law. The claim for refund was rejected by the Commissioner on June 11, 1935.

Findings of Fact.

The decedent was the son of James M. Beebe who died about 1875, and whose estate early in 1919 was being administered by E. Pierson Beebe, a brother of the decedent, and Francis C. Welch, the father of the plaintiff Welch, as co-trustees. This estate in 1919 was worth about three million dollars.

Up to 1919 E. Pierson Beebe, in addition to administering the estate of James M. Beebe, had the investment and management of the estate of the decedent, although under no instrument of trust or other legal relationship. By his advice and his activities in behalf of the decedent he had materially increased the decedent's estate. Some time in 1919 Francis C. Welch, one of the co-trustees of the James M. Beebe estate, died, and his son, E. Sohier Welch, a plaintiff here, succeeded him as co-trustee of that estate. On March 1, 1919, E. Pierson Beebe was declared, by a court of competent jurisdiction, to be an insane person, and incapable of caring for himself, and the decedent succeeded him as a co-trustee of the estate of James M. Beebe.

On April 8, 1919, Frank H. Beebe and E. Sohier Welch were appointed guardians of the person and estate of E. Pierson Beebe, and continued as such until his death on August 8, 1926. At the time of the appointment of guardians the estate of E. Pierson Beebe was worth between six and seven million dollars. Welch later became the guardian of C. Philip Beebe, who was adjudged insane about 1920, and whose estate was worth approximately two or three million dollars.

As a co-guardian of E. Pierson Beebe, the decedent had the custody of a will which had been drawn by E. Pierson Beebe prior to his having been declared incompetent. Under this will the decedent was to receive one-half of the E. Pierson Beebe estate.

Upon assuming the co-guardianship of the estate of E. Pierson Beebe, and the co-trusteeship of the estate of James M. Beebe, the decedent retained the old offices and clerks of E. Pierson Beebe at

No. 6 Beacon Street, Boston. At first he becamee active in the management of these two trusts, frequently consulting Welch with regard to management and investment. The decedent was enjoying excellent health, and was a man of wealth in his own right. Up to this time his interests had not been those of a business man. He loved art, music, flowers and pictures; was a regular patron of the opera and concerts; spent much of his time in the woods among the trees and flowers, and annually planned the flower garden for his huge summer estate at Falmouth. He was fond of animals; was a collector of paintings and pictures. He was not interested in the business world, and many times expressed a distate for it. He had followed the pursuits of a true gentleman of leisure whose tastes were aesthetic.

After a short time he became dissatisfied with the burdens he had assumed, and in April of 1921, desiring to be relieved of them, and at the suggestion of the plaintiff Welch, secured the services of Sylvester Brown, who became the office manager for the decedent. Brown's activities were principally in connection with the estate of James M. Beebe, and the co-guardianship of the estate of E. Pierson Beebe. Gradually he took over nearly all of the decedent's work as co-trustee and co-guardian.

The decedent was fond of travel, and made frequent trips to Europe. In the summer of 1923, while visiting in England, he had some bladder trouble, consulted a physician, and was catheterized by him. During the last week of February 1924 the decedent consulted his family physician, told him of his experience in London, and of the fact that the English physician had advised that an operation would be necessary. He was referred by his physician to a specialist. After consultation with the specialist, and about February 25, 1924, the decedent advised his housekeeper that he was going to submit to an operation, and that he was going to Falmouth for a couple of weeks of rest before submitting to it. She advised against the delay, and on February 29th he entered the hospital for the operation. After a period of pre-operative rest, a prostatectomy was performed on March 5th. At that time the decedent was nearing his seventy-first birthday. A short time later a secondary operation was per-

formed. After a normal convalescence, the decedent was discharged from the hospital on April 15, 1924, and, after regaining his strength, continued in good health until shortly before his death on November 20, 1932. Death was due to myocarditis and arteriosclerosis which had their inception about two months before his death.

Prior to the first of January, 1924, the decedent had made modest financial contributions to relatives and persons close to him. Some time between the 1st and the 15th of January the decedent first discussed with E. Sohier Welch the possibility of creating certain trusts in order that he might be relieved of the importunities of these relatives and friends, and in order that the beneficiaries of his generosity would receive regular payments from the trust rather than the hit or miss gifts that he had previously made to them. A second conference was held between the two during which the provisions of the trusts were discussed, and on February 13, 1924, the decedent executed four trusts which will hereinafter be referred to as trusts A, B, C and D. On the same day he also attempted to create a fifth trust which will hereinafter be referred to as the Frank H. Beebe trust, and which will be separately discussed. Two days later he made changes in his will so as to avoid the possibility of a duplication of gifts.

Trust A, in the amount of $25,000, was to run for a period of twenty years, unless earlier terminated by the trustees. As a matter of fact, this trust was terminated prior to the death of the decedent, and the principal was distributed before his death. The income from this trust had been paid two-fifths to a lawyer friend, one-fifth to a clergyman, and two-fifths to the caretaker of the decedent's estate. Upon the termination of the trust, one of the beneficiaries of the trust having died, one-fifth part of the principal was returned to the decedent in accordance with the terms of the trust. The other four-fifths were distributed in equal shares to the other beneficiaries named in the trust. Regardless of the facts surrounding the creation of the trust, at its termination, the transfer was complete, and the decedent had parted with his entire interest in the fund.

Trust B was in the amount of $100,000, and was for the benefit of Mary Van Arnam Brown, a first cousin of the decedent. Up to

the time of the creation of this trust, the decedent had augmented her moderate income by giving her sufficient to live on. Under the trust she received between $4500 and $5000 a year. The trust further provided that after the death of the said Mary Van Arnam Brown the income was to be distributed among a class of people to the last survivor, and after the death of the last survivor, the principal of the trust, as it then existed, was to be distributed among the living issue of the class referred to per stirpes. Under this trust it is apparent that the decedent parted with all interest in the trust fund, and that the transfer was complete.

Trust C, in the amount of $125,000, provided that the income from that fund should be payable in stipulated amounts to certain employees and friends of the decedent during the term of the trust, and upon the death of the last survivor of them and certain other persons mentioned in the trust, the principal of the fund was to be paid to the living issue of five nieces and nephews of the decedent. In this trust the decedent parted with all interest in the trust fund, the transfer was complete, and under it there could be no reversion to his estate.

Trust D, in the amount of $10,000, provided for payments of income to one Sarah B. Field, a school teacher in the City of Boston, and an old friend of the decedent, to whom he had previously made other gifts during her life, and upon her death the fund as it then existed was to revert to trust C set forth above. The beneficiary of trust D died during the lifetime of the decedent, and the trust fund was actually absorbed by trust C.

On February 13, 1924, the same date on which trusts A, B, C and D were carved out of his own estate, the decedent attempted to create a fifth trust, previously referred to as the Frank H. Beebe trust. The trust fund was to be derived from a legacy contained in the will of E. Pierson Beebe, who was then living, but under guardianship as an incompetent. Under the will made before he was declared insane he had left about one-half of his estate to the decedent, who attempted to create a trust therefrom reserving to himself the income for life. After his death the income was to be divided one-third to George Stanley Fiske, during his lifetime, and there-

after to his issue; one-third to his niece, Esther Fiske Hammond, during her lifetime, and thereafter to her issue; and one-third part to the issue of Esther Fiske Hammond, and on default of any such issue the income was to be added ratably amongst the other beneficiaries.

He further provided that upon the death of the last survivor of the decedent, his nephew George Stanley Fiske, his niece Esther Fiske Hammond, and the children of Esther Fiske Hammond, the principal of the estate as it then existed was to be paid over one-third to the then living issue of George Stanley Fiske, and two-thirds to the surviving issue of his niece, Esther Fiske Hammond, with the provision that in the event that there were no survivors of his niece or nephew, the principal was to be paid to "those persons who would have been entitled to receive the same according to the laws of the Commonwealth of Massachusetts then in force" as if it had been the absolute property of the decedent. This instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the grantees or the beneficiaries to the decedent. Whether or not this instrument was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions.

The confirmation and ratification was brought about by the fact that an attorney to whom the matter was submitted on the death of E. Pierson Beebe gave his opinion to the effect that the instrument of February 13, 1924, was not a valid trust instrument for reasons that he then stated. Acting on the advice of the attorney, a confirmation and ratification of the instrument was made. While this was being done the decedent caused the number of trustees to be changed from two, as written in the original instrument, to three, and caused himself to be elected one of the trustees. His purposes in having himself appointed a trustee were (1) to have the name of Beebe connected with the trust, and (2) because he wanted part of the commis-

sions. His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends. All of the beneficiaries named in it were either those who on his death would be his heirs or their issue.

In 1926 and 1927, Welch, Brown and the decedent, as trustees, received the property to which the decedent became entitled under the will of E. Pierson Beebe. These three up to the time of the death of the decedent, and Welch and Brown since then, have been holding that property, and handling it under the terms of the instruments executed on February 13, 1924 and October 22, 1926. Copies of the instruments have been filed with the register of the probate court, and the trustees' accounts have been allowed from time to time. In all five trusts the trustees named were E. Sohier Welch and Sylvester Brown. In addition to acting as co-trustee under these trusts, Welch was co-trustee with the decedent of the estate of James M. Beebe, co-guardian of the estate of E. Pierson Beebe, guardian of C. Philip Beebe, and was also Frank H. Beebe's attorney. Sylvester Brown was a brother of George Brown who in turn was a partner of E. Sohier Welch.

CONCLUSIONS.

As to trusts A, B, C and D, I find and rule that the transfers made by the decedent were not testamentary in character, made in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent, and that the gross estate of the decedent should not include the value of those trusts. The decedent had for many years contributed to the beneficiaries, and his dominant motives in the creation of the trusts were to relieve himself from the burden of further caring for these individuals personally, to relieve himself from their importunities, and to guarantee a regular payment of income to the recipients. With the exception of trust A, the decedent parted with all interest in the funds, created no right of reversion, and the transfers were complete during his lifetime. The fact that the decedent was about to undergo an operation, with a resultant possible apprehension of death therefrom, may have provided the occasion for the creation of the trusts, but

can hardly be said to have been the dominant motive. I find that the dominent motives were as previously stated, and that they were more consistent with life than with death.

As to trust A, the trust having been executed during the lifetime of the decedent, and the decedent having accounted in his income tax return for the one-fifth share received from that trust, we need only consider the distribution of the remainder of that trust. Upon the termination of the trust, the other four-fifths of the trust fund were paid to the surviving beneficiaries, and as to this four-fifths interest, the donor parted with his entire interest, the transfer was complete, and this fund was not taxable as part of his estate.

There is nothing in the evidence to warrant my finding that in the creation of trusts A, B, C and D the decedent was actuated by the thoughts of death either imminent or remote.

As to the fifth or Frank H. Beebe trust, it would appear at first glance to be similar to a trust held valid in *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S. 85, yet a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift. Decision as to taxability does not stand or fall on the type of instrument chosen to effect the transfer. It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition. The statutory description embraces gifts inter vivos, despite the fact that they were fully executed, are irrevocable and indefeasible. *United States* v. *Wells,* 283 U. S. 102–116–117. The dominant purpose of the statute is to reach substitutes for testamentary dispositions, and thus to prevent the evasion of estate tax. *United States* v. *Wells* (*supra*).

The decedent was more than seventy years of age, had never married, and was the possessor in his own right of an independent fortune. He was a man who did not want to be bothered with business details, and the thought of succeeding to an estate of approximately another three million dollars was disconcerting because of the necessity of its management. He was apparently perfectly

willing to receive all of the income that might be drawn from the fund, but did not want to have the burden of its management. Indeed the prime purpose advanced by the plaintiffs for the creation of this trust was to relieve the decedent of the burdens of management. Such a purpose, while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others.

The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly. To my mind this is not consistent with such an inter vivos gift as would in and of itself be exempt from the statute. The added reason that he had for the creation of the trust, and the only other reason advanced by the plaintiffs, was a desire to rid himself of the demands of friends and relatives. The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift. His motives could have been satisfied by the creation of a simple trust with the reservation of a power of testamentary disposition, or by the direct employment of a manager of the fund. What he really intended to do was to effect an arrangement that would relieve him of the burdens of his brother's estate, and rid him of the importunities of his friends and relatives.

His real purpose was not to establish a trust for others, or to make a then present transfer of the property to others. The trust instrument was merely the vehicle that he chose to accomplish his purposes of avoiding the burden of managing the estate as well as the importunities that would naturally follow the ownership of such an estate. Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death. There has been no reason advanced by the plaintiffs why the decedent took this added step, or why he chose an instrument that not only would accomplish the purposes that he had in mind, but which would tend to relieve his estate from the burden of estate taxes.

The plaintiff Welch testified, and I find as a fact, that Welch advised the decedent on financial matters and matters of investment, and that Welch's partner, one George Brown, advised the decedent on tax matters. Brown's testimony was not adducible at the trial, but Welch's testimony to the effect that neither he nor Brown ever discussed estate taxes with Beebe, although admitting the discussion of income taxes with Beebe, falls far from being convincing that the decedent did not receive advice on estate tax matters from Brown or others. That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death. Having considered all of the evidence in the case with its logical inferences, I find that one of the major motives which induced the creation of this trust was to dispose of the estate received from his brother after having reserved to himself for life the entire income from that estate to the last possible demand.

I am of the opinion that the facts in this case are vastly different from these in the line of cases holding gifts inter vivos valid where a settlor has set aside out of his own property a trust fund for others, and has merely reserved the income from that fund to himself for life. In such cases, the dominant motive seems to be the setting up of a trust for others, and the incidental retention of the income for the life of the settlor. In the present case the dominant motive seems to be the retention of the income for the life of the settlor, and the incidental setting up of a trust to accomplish this purpose. There is lacking an intent or motive to make a then present gift, and it is only by virtue of the instrument used to accomplish the purposes of the decedent that there can be any claim of a right to dispose of the property after the death of the decedent as a mere incident to the trust.

It is at such subterfuge that Section 302 (c) of the Revenue Act of 1926 is aimed. No one could quarrel with the decedent insofar as he set up a trust fund, or took any other step to rid himself of

the burden of management of the fund, or to be rid of the importunities of his friends and relatives, but when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death.

I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator.

In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932.

The Commissioner determined the net estate of the decedent to be $5,312,194.11. From this amount should be deducted the total value of trusts A, B, C and D as set up in such determination. After this deduction has been made the estate tax should then be computed in accordance with the schedule in force on the date of the decedent's death. Judgment may be entered for the plaintiffs in the amount of the tax that has been assessed and paid over and above that resulting figure, with interest at the rate of 6 percent per annum from the date or dates of overpayment, if any, with costs. The computation of the actual judgment may be determined by agreement of counsel, or, if unable to agree, upon application by either party, the question will further be considered by the court.

The defendant's motion for judgment is denied.

The plaintiffs' request for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. The defendant's requests for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent.

PLAINTIFFS' BILL OF EXCEPTIONS AS AMENDED.

[Filed September 12. 1936; Allowed November 30, 1936.]

This is an action at law to recover amounts paid by the plaintiffs to the defendant on account of Federal estate tax on the estate of Frank H. Beebe, who died in November, 1932. The pleadings may be referred to, as may also the several exhibits introduced, marked "Plaintiffs' Exhibits 1" through "14" and "Defendant's Exhibits A" through "I", and the opinion of the court mentioned herein, all of which are hereby incorporated into and made part of this bill of exceptions by reference.

The case was tried on a written waiver of jury trial before Sweeney, J., on February 14, 25, 26, 27, 28, and July 20, 1936. On July 20 the court handed down its opinion.

MISS MAUD ROBINSON, a witness called for the plaintiffs, testified in substance as follows:

I was housekeeper for Mr. Frank Beebe about fourteen years from 1918 until he died and was in his household all of that time with few vacations. The household consisted of a housekeeper and eight servants in Boston and we went to Falmouth for the summers. I had all of my meals with Mr. Beebe and went out with him often in the daytime and was with him often in the evenings at home and sometimes went out with him. Mr. Beebe's health was very good from 1919 to 1924. He was in very good spirits and slept very well. He was very fond of the beautiful. He loved art, music, pictures and flowers. He went to concerts and the opera and had music at home. I often went to concerts with him. At Falmouth he was in the woods a great deal. He drove in the woods and had a flower garden in which he was much interested and spent much of his time planning. In the Spring he would get flower books and would go over those and pick out his seeds and talk with his gardener and plan the garden for the coming Summer. The estate at Falmouth consisted of about a thousand acres. There were drives and bridle paths through it and I frequently drove with Mr. Beebe. It was possible to drive on his place an hour or so without going over the same road. The

concerts which he went to were those of Kreisler, Rachmaninoff and the Symphonies. He sometimes went to concerts in the morning.

When he was at Falmouth he went to the stable in the morning, talked with his man, and often drove in the woods. In the afternoon he took a nap regularly, then went for a drive. While he was at Falmouth he went to town only occasionally for a day or two and he stayed at Falmouth until November, once as late as Thanksgiving time. When he was in Boston I always saw him at breakfast. He would go off in the morning around ten o'clock and almost always come home for lunch, take a nap in the afternoon, then would go and see pictures or to a concert. I have often heard him say that he did not like business, that it did not interest him much.

One afternoon in February, 1924, I came home and found him coming down the stairs with someone. That evening he told me it was a doctor and that he was going to have an operation. This was not more than a week before the operation occurred. He told me he thought he would go to Falmouth for two weeks and rest, but I advised him not to wait but to go immediately. He did go very soon. That was the first that I learned that there was to be an operation. Up to that time he seemed perfectly well and I had not noticed anything unusual about his health. He had had no illness prior to that time except colds. Prior to his operation he had been taking out his seed books, going over them and planning for the summer. While he was in the hospital, I went to see him nearly every day. After he returned he began to gain immediately, and the next three or four years after that he seemed to be very well. He had no serious illness so far as I know. His pursuits during that time were the same as before. He went to operas and concerts. He was always very much interested in the Boston Conservatory of Music and was a trustee of it.

During the period from 1919 to 1924, he went abroad several times. In 1923 he went with Mr. Carroll, a clergyman, who was ill while he was over there. After 1924 he continued his interest in his garden and music.

I think Mr. Beebe went abroad after 1924. His brother, E. Pier-

son Beebe, died in 1926, and Mr. Frank Beebe was abroad at the time.

I remained with Mr. Frank Beebe until the time of his death. Until shortly before his death I noticed no particular letting up of his activities or interests. The photograph which is Plaintiffs' Exhibit 1 was taken within a year of his death and is an excellent picture of him. I was there when the picture was taken in the sunken garden. There were about three gardens, some of them as large as this room.

Before Mr. Frank Beebe went to the hospital for his operation he seemed perfectly cheerful. There was nothing about his appearance, his conversation or his actions which indicated to me that he expected to die.

While he was at Falmouth he drove his horses and rode horseback a little.

Mr. Frank Beebe told me at one time that he himself never had any care of his property until his brother Pierson became incompetent. Mr. Frank Beebe told me that he did not like business, the financial part.

On *cross-examination* the witness MAUD ROBINSON testified substantially as follows:

I think Mr. Frank Beebe was in his 70's when he died. I suggested that he go to the hospital immediately instead of Falmouth before his operation because I think it is better for everybody not to wait. Mr. Beebe was bothered somewhat by colds from time to time but nothing serious. I do not think that he went to his office regularly. For a time perhaps he went frequently but later he did not go quite so much because he had someone who had taken charge. Mr. Beebe did not take people in his household into his confidence about matters generally. He was not a complaining man. When he came back from the hospital he gained very fast and seemed very well. Prior to his operation visits of doctors to the house were not more frequently than they ordinarily had been. I received a bequest of $15,000 under Mr. Beebe's will.

On *redirect examination* the witness MAUD ROBINSON testified substantially as follows:

The person who took charge of his office was Sylvester Brown. Mr. Beebe told me that he had taken charge and that he had relieved him a good deal. I think that Mr. Pierson Beebe went to a sanatarium about 1918.

Miss Mary V. A. Brown, his first cousin, was at the house of Mr. Beebe at the corner of Beacon and Dartmouth as a visitor in 1919 and 1920 and she spent some time at the Falmouth estate, coming every summer until she died.

Mr. Beebe never at any time spoke of death to me. He went regularly to Statler concerts in the morning. I thought that his recovery was complete after the operation. I did not notice any difference in his weight before the operation and after the operation.

Dr. WILLIAM C. QUINBY, a witness called for the plaintiffs, testified on *direct examination* substantially as follows:

I live in Brookline and I am a surgeon. I got my medical education at the Harvard Medical School and have been associated with the Massachusetts General Hospital, the New England Baptist Hospital, the Boston Dispensary, the Johns Hopkins Hospital, and I am now in charge of the urological surgery at the Peter Bent Brigham Hospital and clinical professor of urology at the Harvard Medical School. I was assistant in urology at Johns Hopkins. I have specialized in urological surgery, which is surgery of the urinary organs and the genital organs, and I am still practising that specialty.

In 1924 Mr. Frank Beebe came to me at Dr. Allen's suggestion, and I saw Mr. Beebe the following day at his house. He was admitted to the Peter Bent Brigham Hospital on February 29, 1924, and the operation was on March 5. In such instances the patient is put at rest for several days. After five days of rest with appropriate treatment, as his condition in other respects was entirely satisfactory, he was operated on on March 5 and the prostate removed. The prostate was enlarged and caused obstruction at the outlet of the bladder. There was nothing unusual in the performance of the operation. I considered him a very good risk for the operation and told him so. I did not observe any amount of apprehension on his part with respect to the operation. He was very cooperative, more

so than is generally the case for such an operation. He was perfectly placid and not alarmed in any way. He made a very good convalescence without any hitch at all. His recovery was splendid.

I have specialized in this branch of surgery since I went to Baltimore in 1914. The rate of mortality in these operations in general is approximately five to six percent. In my own experience it is definitely less than that, somewhere around two to two and one-half percent. I thought that Mr. Beebe was an excellent risk and I told him so. During his stay in the hospital his condition was satisfactory, not alarming in any way. His blood pressure was within low normal limits and so far as it went indicated an absence of myocarditis and of arteriosclerosis. His heart sounds were regular and of good quality, which indicated that the heart was normal. He was discharged on April 15, which indicated that the operation had been successful and that he had convalesced within the usual, average length of time. The results of the operation were excellent. I saw at this time no indication of heart disease or hardening of the arteries.

I have been associated with clinics in which 140 operations removing the prostate have been done without mortality. The patients ranged from 58 to 80.

I had never seen Mr. Beebe professionally until a few days before the operation. His condition had not become very painful or serious and it was a matter of election on his part whether to have the operation or not.

I told him that if he had his prostate removed he would get an excellent result, the dangers were not at all great and that the delay often was much more dangerous than to have the gland removed. He accepted the situation very placidly.

There was a secondary operation with reference to the bladder. This was due to a slight complication which had nothing to do with the patient. This was not the two-stage operation. His operation was a one-stage removal of the prostate.

I observed nothing about Mr. Beebe that indicated that he was expecting death as the result of the operation.

On *cross-examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

The first contact I had with Mr. Beebe was on February 25th when he came to my office. He told me that he had been suffering from difficult urination for about a year and a half, with increasing difficulty over that period of time, and that he had been advised by a surgeon in London he would probably have to have his prostate removed at some time.

A man is as old as his condition says. The numerical age of the patient has little to do with the matter. Mr. Beebe's condition was good from a surgical point of view so that in his case I did not consider that it was a very serious operation. Looked at from one point of view any surgical operation under general anesthesia is a serious operation. Prostatitis is a major operation. The fair, general average of mortality is approximately 6 percent, but if one selects the patient the mortality necessarily falls lower. The type of surgeon and the type of hospital equipment and care which the patient secures have something to do with the mortality rate. My mortality rate has been less than the mortality rate of surgeons with less fortunate surroundings. There has not been a substantial increase or advance in facilities and knowledge with respect to prostate operations since 1924. Most of the progress was before that date. There have been changes which have a tendency to reduce the mortality rate.

Myocarditis is inflammation of the muscles of the heart wall and a deterioration of the muscles of the heart.

The death certificate states that Mr. Beebe died in November, 1932, and that his death was due to chronic myocarditis and arteriosclerosis. The use of the word "chronic" means that the deterioration was not a sudden thing. The same is true in reference to arteriosclerosis. It is gradual. Before the operation in 1924, I examined Mr. Beebe's heart to see whether there was any deviation sufficiently marked to raise a question as to the functional value of the organ.

A general anesthesia was not needed for Mr. Beebe's second operation. Mr. Beebe did not tell me that he had been in delicate health. My recollection was that he had been furnished by his London surgeon with a catheter but Mr. Beebe said that he had never had to use it.

On *redirect examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

The retention of 7½ ounces of residual urine, if permanent there, would be serious but it would not be important if it was found on only one occasion. [At this point counsel for the defendant stated that he did not know whether there was more than one occasion on which there was such a retention.] From the fact that Mr. Beebe had little trouble after the experience in London, I should judge that his residual urine was not the same continuously and that it immediately diminished. My judgment that he needed an operation was based on the fact that he certainly was going to need one soon and certainly it was better to have it immediately and not to wait until the bladder was more and more handicapped, but his particular operation was a matter of election.

On *recross examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

"*Q.* Now just a moment more, Dr. Quinby. The reference to the cases mentioned, as to the retention of the 7½ ounces of residual urine, in a person who has prostate trouble, his difficulty, is it not, is with the retention of his urine? *A.* Is that in the form of a question?

Q. I am asking whether any patient who is suffering from prostate trouble suffers from retention of urine, does he not? *A.* Yes.

Q. So that if Mr. Beebe had prostate trouble for a period of two years or so, he would have during that period some amount of residual urine, would he not? *A.* Some amount, yes, but not necessarily as much as you say.

Q. No, I do not mean to intimate that. That is all, thank you.

The Court. Doctor, when they refer to 7½ ounces of residual urine, do I understand that is the amount of urine that is down in the bladder which cannot be expelled without mechanical means?

The Witness. Yes, that is right."

Dr. SEABURY W. ALLEN, a witness called by the plaintiffs, testified in substance as follows:.

I am a physician residing at 20 Charles River Square, Boston. I have been in general practice in Boston since my graduation from the Harvard Medical School in 1897. I knew Frank H. Beebe first about 1887 or 1888 and became his family physician. His health was good up to 1924, and I never heard of any serious illness up to the time of his operation. He went abroad in the summer of 1923, and on his return told me he had been examined by a surgeon or physician in London, who told him he probably would have to have an operation on his prostate some time. I verified that diagnosis and found that he had a prostate that was partially obstructed, enlarged.

He had more or less difficulty in passing urine. I prescribed the ordinary, simple treatment for that condition and temporized for the time being. An early operation was not indicated to me at that time, not until perhaps a week before the operation. Then I told him that he should be operated on to save a worse condition and if it were performed early he need have no particular worry about it. I told him that the prostate would have to be taken out and the obstruction relieved but that the worst thing for him probably would be the time he was confined to the hospital, for several weeks. I did not in any way indicate to him any possibility of a fatal outcome of the operation. He asked me if it would be a serious operation and I told him not if it were done by an expert and without delay. I saw him at the hospital before the operation. He was his usual self, cheerful and looking well. His physical condition was good. I thought that his chances of recovery were excellent.

I saw Mr. Frank Beebe on his return from abroad in 1926. His condition was perfectly good as I remember it.

After his operation he followed his usual routine, and his health was good until possibly two or three months before he died. In layman's terms he died of old age, but one is not allowed to give this as a cause of death on a death certificate. He died a senile death. There was no very definite diagnosis. There is always under those circumstances arteriosclerosis and a weakened heart, so I put that

down. I did not discover any weakness or defect in the heart until September of the year he died, 1932. I use the word "chronic" only as distinguished from acute. The arteriosclerosis did not come on immediately. I had not diagnosed the condition of myocarditis or arteriosclerosis in Mr. Beebe before September, 1932, and after the operation and down to the time of his death I do not recall any serious illness he had until his last illness. Through the years on many occasions Mr. Beebe often referred to his dislike of business. On a number of occasions he said he did not wish to be tied down to going to the office and being restricted from travelling and following outside pursuits. He spoke to me about being relieved of his business cares and expressed pleasure on a number of occasions at not having to go to his office. His whole attitude was he was glad to be rid of that kind of thing. He told me that he wished to be relieved of business cares in order that he might give attention to the things that gave him pleasure, especially music and flowers. This was his attitude over the years.

An affidavit of GEORGE GOODING, consisting of four pages, dated June 5, 1934, was introduced in evidence and marked "Plaintiffs' Exhibit 10", and was read into the record as follows:

"I, George Gooding of Falmouth, Massachusetts, on oath depose and say as follows:

"I started to work for Frank Huntington Beebe in 1894. My wife, Bertha Christine Carlson, started to work for him in 1900. We were married in 1906 and from then until 1931 (when we built our house on Sidders Pond Road, Falmouth, Massachusetts) we lived in the Beebe houses in Falmouth and Boston. From 1894 until 1919 I was coachman for Mr. Beebe and for other members of his family and from 1919 until Mr. Beebe's death I was caretaker at Highfield, a large estate owned by the trustees u/w of James M. Beebe consisting of about 900 acres, a large mansion house, stable and other outbuildings. My wife, for the first two years of her employment, served as laundress for Mr. Beebe and the other members of his family in Boston and Falmouth. She then became their cook and served in that capacity until we were married. From 1906 to 1919 she served

the family as accommodator and from 1919 until Mr. Beebe's death she served him again as cook at Highfield.

"During all those years of our association with Mr. Beebe I never knew him to have a serious illness until the winter of 1924 when he went to the hospital for an operation and after his recovery from that operation he was smart as a whip until the summer of 1931, when I noticed that he was failing slightly.

"In the spring of 1923 Mr. Beebe bought the Davis woodlot, so called, adjoining the Highfield property and which contained about fifteen acres. The bounds of that lot were not clear and Mr. Beebe refused to pay for it until bounds had been set by a surveyor. I walked over the lot with the surveyor and found the bounds and Mr. Beebe paid for the lot. During the summer of 1923 Mr. Beebe had a great deal of work done cleaning up the woods and the property near the railroad station. He had the fences repaired and many trees, shrubs and flowers planted at Highfield, including extensive work in the greenhouse. He had always been interested in flowers, shrubs and trees and you might say that in the summer of 1923 he was at the height of his glory in beautifying Highfield. Mr. Beebe owned himself several of the woodlots adjoining Highfield. but Highfield was owned to my knowledge by the James M. Beebe estate and most of the work which was done by Mr. Beebe in beautifying Highfield was done to the property owned by the James M. Beebe estate.

"During the summer and fall of 1923 Mr. Beebe appeared to be in extra good condition. He was always at the stable before eight o'clock in the morning, drove himself through the woods almost every morning and afternoon, and frequently helped the men in their work. He was very fond of chopping and trimming trees and always took an axe and a whole kit of pruning tools with him in the wagon. I almost always accompanied him in the wagon, and during the summer and fall of 1923 he was planning changes and improvements to the property for many years to come. He never said anything to indicate that he expected to die before the lapse of many years.

"Mr. Beebe, unless travelling, made a long summer season at Falmouth, usually staying there from June until the middle of Nov-

ember, and during the winter and early spring made visits to Falmouth every two or three weeks. On those occasions he usually stayed at Highfield two or three days. During the fall of 1923 and early winter of 1924 he paid Highfield his customary visits.

"Soon after I was married I purchased a house in Roxbury. My wife and I intended to live there but Mr. Beebe objected to our being so far away from his house. I rented the house for some years and then sold it, taking back a mortgage for part of the purchase price. In February 1924 I received notice from the City of Boston that the property was to be sold for taxes. I came to Boston several days before the end of February and did not know that Mr. Beebe was sick until I arrived at his office. I was shocked because when I had last seen him in Falmouth several weeks before he had appeared very well. I went to see him at his house and he told me that his lawyers would attend to my troubles and asked me to go back to Falmouth to attend to my work. He did not look like a sick man and said nothing to indicate that he was going to have an operation or was thinking of the possibility of death. I returned to Falmouth immediately and a day or two later heard for the first time that he had gone to the hospital for an operation."

E. Sohier Welch, a witness called by the plaintiffs, testified in substance as follows:

I am a graduate of Harvard College and Boston University Law School. I was admitted to the bar in 1911 and I am a lawyer but have practised as a trustee and executor of estates and a manager of property. My father, Francis C. Welch, and my grandfather were in the same sort of business. I first became acquainted with Mr. Frank Beebe about 1918. My father was trustee of the estate of James Beebe, the father of Frank. James M. Beebe was one of Boston's most noted merchants and owned a large amount of property in Boston. He left five children, of whom the eldest was E. Pierson Beebe, who became the head of the family. He had another son, J. Arthur Beebe, who had a son, C. Philip Beebe. The other children of James M. Beebe were the daughter Mrs. Fiske (who had two children, Esther Fiske Hammond and George S. Fiske) and one other unmarried daughter.

When I came into the office in 1911 my father and E. Pierson Beebe were serving as trustees of the estate of James M. Beebe. E. Pierson Beebe was the head of the family. He ran the family accounts, had the family office. The family investments were handled there. His brother Frank was not concerned in the family affairs. E. Pierson Beebe was an intelligent man of great ability and of very charitable purpose. The James M. Beebe estate consisted of some large pieces of real estate in Boston and a large amount of personal property. It must have been around some three million dollars or more. My father died on February 19, 1921, and I succeeded generally to his business as a trustee of almost all of his trusts. E. Pierson Beebe was then living but for some years he had been in failing health. J. Arthur Beebe had died. Mrs. Hammond and Mr. Fiske were alive. They were the daughter and son of the deceased sister of Mr. Frank Beebe. Mrs. Hammond was a widow who had six children. Fiske never married and had no children. Frank never married. There was a sister who had died unmarried some years before that.

I became trustee of the James M. Beebe estate with Frank Beebe. Pierson Beebe had been ill and was unable to continue as trustee. Frank Beebe and I were appointed. At the same time we were appointed guardians of E. Pierson Beebe, who was unable to act for himself. At that time the estate of E. Pierson Beebe was worth six or seven million dollars. I also became attorney for Frank H. Beebe and guardian of C. Philip Beebe, who was declared insane in 1919 or 1920. The estate of Philip Beebe was worth two or three million dollars and consisted of more personal property than real estate. Frank Beebe never married and Pierson Beebe never married.

E. Pierson Beebe's office was at 6 Beacon Street and Mr. Frank Beebe took that over. The books were kept in his office. The clerks were there and Frank Beebe came down for a certain amount of time, signed letters, etc. He had never had any business experience of any kind, and general business matters and the management of investments were arranged after consultation with me. He was a skilled musician and a member of many clubs. He had a great interest in horticulture and floriculture and attended all the concerts and

operas that came to Boston, and had concerts given in his home. He was a patron of musicians, a great traveller, going to Europe frequently, and a gentleman of leisure who thoroughly enjoyed life. While Mr. Pierson Beebe was competent, he ran Frank's affairs. Sylvester Brown came to the Beebe office, I think, in April 1921. I was running a large office of my own and it was impossible for me to devote as much time to his office as was required; and, as Frank Beebe was not experienced in business, I suggested to him that we should obtain some skilled person to take charge of the details of his office management and in general advise him and me. We selected Mr. Sylvester Brown and he proved adequate. Mr. Beebe was pleased with him, told me he was delighted to have Mr. Brown there, and was glad to have his help because he wanted to devote more time to his own pursuits, his gardening, his music and his travelling. Mr. Brown became more and more persona grata to Mr. Beebe, being not only in Mr. Beebe's confidence but in his affection.

A picture (which was introduced in evidence as Plaintiffs' Exhibit 11) is a very good picture of Mr. Beebe as he appeared in 1924 and 1925. Mr. Beebe was a man nearly six feet tall, well set-up, handsome, well dressed. He always had a flower in his buttonhole, beard neatly trimmed. He walked with a rapid step and was vigorous. In 1924, 1925 and 1926 his health was excellent. All over the years it was the same. I presume that I learned of his operation in 1924, but I did not know of it until either after the operation had taken place or he had just gone to the hospital. He never told me he was going to have an operation and never at any time said anything indicating that he was contemplating death. I could imagine no man who had a greater degree of vitality or interest in life or thought less about the future life and anything in any way connected with death. He was constantly busy, having people at his house, giving concerts, giving luncheons to musicians, attending concerts. In the winter time, he was preparing for the opera season and getting seats, going to Europe, preparing his plans for planting at his Falmouth estate, taking drives and taking pleasure in the finer things of life. The Falmouth estate belonged to the trust under the will of James M.

Beebe, but Mr. Beebe spent money on it as generously as if it were his own.

From 1920 to 1927 Mr. Frank Beebe and I were always discussing opera and symphonies, and Mr. Beebe was always extremely interested in the plans which I was making, what opera should be given and on what date. He was one of the larger guarantors. I was also trustee of the Symphony Orchestra for five years. Mr. Beebe was trustee of the Boston Conservatory of Music and was a very generous subscriber to their new building. He went to Europe nearly every year. He spoke French and German fairly fluently. He went abroad every year until the last two or three years of his life.

The estate at Falmouth was enormous, with gardens, barns, etc. It was a very large and luxurious place.

In 1922 or thereabouts, Mr. Beebe and I had a conversation about a real estate trust. The James M. Beebe estate owned a great deal of real estate, and it seemed wise to form a trust in order that it might be in the form of transferrable shares and that there might be continuity in management of the estate. Discussion of this matter continued for a period of nearly four years. Mr. Beebe was always dilatory about his business affairs because he hated to go to his office and attend to business. Letters would remain unanswered for days, sometimes weeks. The real estate trust finally was not put through. During the discussion about the real estate trust, there were discussions between Mr. Frank Beebe and me with respect to the formation of the trusts which are involved in this action. This was some time after 1922. Mr. Beebe stated that he desired to be relieved of the duties of the business. Mr. Beebe had found Mr. Brown satisfactory and had come to trust him in a large degree. He said that he felt so far as possible he would like to put the details of the business and the management of the affairs on Mr. Brown's shoulders.

He also wished to save the labor of handling the gifts he was making to various people. He had been giving money and other things to friends, relatives and employees; and these trusts were designed to relieve him of the burden and to make the payments regularly. I am referring to the trusts which we call the A, B, C and D trusts. I told him I thought it was an excellent idea because

it would enable the persons to receive their money at certain stated times and would relieve him of a considerable amount of income taxes which were taken directly off the peak of his own return. The beneficiaries of these trusts were persons whom he had been helping. He also said that there were certain people who were a little importuning in their requests for money, and that he felt it would relieve his mind somewhat if gifts were made regularly. In that connection there was discussion between me and Mr. Frank Beebe as to the amount which he would receive under Mr. Pierson Beebe's will. He and I knew the terms of Pierson's will, which had been drawn by my father. He knew that he would receive a half of Pierson's estate. He was averse to the idea of managing more property than he already had and said that he wished to be relieved of the responsibility and wished Sylvester Brown and me to manage it. This estate approached seven million dollars in value.

Mr. Frank Beebe said the first four trusts were designed to help persons who were importuning him. The purpose of the large trust was to relieve him of the burdens of management which would devolve upon his shoulders and to be able to say to members of his family who might ask him for money that the property was entirely in the hands of trustees. He also wished to concentrate the management of the Beebe property. Under E. Pierson Beebe's will, C. Philip Beebe obtained about half of Pierson's estate and I was guardian of C. Philip Beebe. Mr. Frank Beebe mentioned this. He did not wish to give up the income from Pierson Beebe's estate. I told him that he could accomplish his purposes by a trust deed, that this would put the property where he would be free of the management, could travel as he pleased and he could have the income himself. At this time I do not think he was consulting anybody except me. The matter of the formation of these trusts began as early as the summer of 1923, possibly as early as June 1923. During these discussions estate taxes were never mentioned and I do not think that Mr. Beebe knew about them.

Mr. Brown and I were appointed trustees under all of these trusts. They were executed on February 13, 1924, at my office. At that time Mr. Beebe was extraordinarily well and I had heard nothing

about any operation or the possibility of any operation. He said nothing either then or later indicating that he contemplated death.

Mr. Beebe went abroad in the summer of 1923 with Mr. Carroll, a clergyman. Mr. Beebe was a good Episcopalian, attended church regularly, did a great deal for the church at Falmouth and gave a good deal of money to the church.

Pierson Beebe died on August 8, 1926. Frank Beebe was then abroad. We cabled to him but he did not return for three or four weeks. After his return Mr. Beebe and I conferred in regard to the validity of the trust of Pierson Beebe's estate and we consulted Mr. Henry Meyer of Rackemann, Sawyer & Brewster. We had a meeting at which Mr. Meyer explained the situation to Mr. Beebe and told him that reaffirmation of the trust was deemed necessary. Mr. Beebe told Mr. Meyer that he wanted to reaffirm the deed and asked him to draw the necessary papers. That conference was held at the Union Safe Deposit Vaults, where the securities of the family were kept. Mr. Beebe was in excellent condition. He expressed a desire then to be appointed trustee so that the Beebe name would be associated with the trust and he said that he wanted part of the commissions.

At that time I had not observed anything indicating that he was contemplating death. I saw him frequently thereafter up to the time of his death. From then to the time of his death, he had less to do with his office, but he devoted himself with an equal amount of assiduity to his own pursuits, such as gardening, music, etc. Mr. Brown and I did everything in connection with the management of the Pierson Beebe property and also the part of Pierson's estate which came to Philip Beebe, except to sign letters. Mr. Brown was the acting manager and I was consulted in all important questions. Mr. Beebe came into the office occasionally and signed some mail and was consulted before we made changes of investments, but I think without exception he accepted our judgment and continued to spend all of his summer and autumn at Falmouth.

In 1924, after we had made various trust deeds, my partner, Mr. Brown, who had drawn his will pointed out that the will ought to be changed so as not to conflict with the trust deed and that was done.

The property of Mr. Pierson Beebe came into the hands of Mr. Brown, Mr. Frank Beebe and me as trustees; and we administered it and submitted our accounts to the probate court and they were duly allowed. The estate of E. Pierson Beebe consisted of a considerable amount of real estate and perhaps 200 different items of stocks and bonds. It required all of Mr. Brown's time to handle that and the other affairs of Mr. Beebe's office.

At the meeting in the Union Safe Deposit Vaults in 1926, Frank Beebe stated that he wished Mr. Brown and me to manage the property but he wished to be a trustee himself. He stated that he expected to devote no time to it.

On *cross-examination* the witness E. SOHIER WELCH testified substantially as follows:

During the time I knew Mr. Frank Beebe he went to Europe frequently. His activities, his own hobbies, were interrupted for a while by his accession to power in the office which became a burden to him. Mr. Sylvester Brown was appointed in 1921 as manager of the office and slowly took over the burdens from Mr. Beebe.

The real estate trust was abandoned in 1926 because the guardian *ad litem* felt that, under a recent decision covering income taxes (*Hecht* v. *Malley*), such a trust would increase rather than diminish income. I know nothing about taxes. My partner attends to them.

Frank Beebe was not a remainderman under the will of James M. Beebe. He was simply a life tenant. He had a one-fifth life interest. This figure may not be accurate.

Mr. Frank Beebe did not return from abroad on the occasion of Pierson Beebe's death because he was enjoying himself and knew that Sylvester Brown and I were there to attend to matters.

The trustees of the trust of Pierson's property created by Frank came into possession of the property in 1927 and 1928. Mr. Beebe was consulted on practically all important matters concerning the trust. I did not advise him to make himself a trustee.

Mr. Beebe was not prompt in cutting coupons and in the management of affairs. He was usually on time for appointments but did not sign papers promptly. Frank Beebe and I were co-guardians of E. Pierson Beebe. We petitioned the court for the guardianship of

Pierson on the ground of mental incompetency. I think that Pierson Beebe was senile. Frank Beebe asked to be named guardian of his own free will and I advised him to apply. Frank Beebe liked income and squeezed hard to get every cent that he could.

"*Q.* Do you remember, Mr. Welch, making the following statement on June 28, 1934, in the office of the revenue agent here at Boston, where you, Mr. Sylvester Brown, Mr. George W. Brown—

Q. —George E. Brown, Mr. William L. Payson, Mr. Henry Hixon Meyer, Mr. G. E. Rausch, chief estate tax officer, Mr. John B. Medore, internal revenue agent, were present—the statement that I make reference to is this— . . .

Q. In answer to the question propounded—well, I will read the question propounded by Mr. Meyer:

'*Q.* Was he interested also in reducing the burdens of managing the property?'

And your answer that I am asking if you remember is:

'Well, I suppose our major reasons were two, and I put the minor reason first, because it came to my mind. I think our office made up his income tax returns anyway and I was familiar with his income taxes, and the amount he paid, and they were becoming exceedingly heavy, and it therefore seemed essential to reduce those in any possible way and I pointed out to him that, as long as he was making substantial gifts every year to various friends and members of his family, there was no reason in the world why he shouldn't make a trust and thus through that means avoid the taxes. This idea appealed to him considerably and it was certainly one of the contributing influences—one of the major contributing influences in the formation of the trust.'

Do you remember that statement? *A.* It sounds like me.

Mr. Hall. You are not going to pause there, are you? Aren't you going to give the complete answer?

Mr. Zimmerman. I am sorry. I will read it further. I thought the question started after that.

'Also as Mr. Sylvester Brown became more and more familiar

with the management of the Beebe office, Mr. Beebe leaned more and more upon him and wanted him to take more and more of the burden off his shoulders, and by the formation of the trust this was accomplished.'

The Witness. Yes, sir.

Q. In that statement, Mr. Welch, you refer to your familiarity with the income taxes and the amounts paid, but that, of course, was through the advice of your partner in turn to you? *A.* I am familiar with the burdens of taxation, but not with the administration.

Q. What do you mean, may I ask you, with reference to the burdens of taxation? *A.* I mean that we have to pay taxes.

Q. Do you advise your clients in your relation with them to— *A.* To avoid all taxes possible that they can do legally, when I know about it.

Q. There is certainly nothing wrong with that advice. *A.* I think it is very good advice.

Q. Do you remember this statement made at the same time, Mr. Welch, and here, Mr. Hall, I am referring to the first question in the entirety appearing on page 18 of the transcript. The question was:

'In other words, he felt that if he were added as a trustee the commission would be split three ways instead of two?'

Your answer being, 'Absolutely'.

A. It sounds quite natural.

Q. The next question being:

'Therefore, that he wouldn't lose quite as much?'

And your answer:

'He was every year squeezing harder and harder to get every cent he could.'

A. That is also correct. He liked income, like us all.

Q. The next question:

'Do you recall whether or not at that conference he made any statement that he formed the trust in order to be relieved from the burden of running the property?'

And your answer:

'Well, that was one of the chief reasons—that and taxation.'

A. That is correct. The taxation referred to, of course, the income tax.

Q. In 1926 Mr. Sylvester Brown was even more active in the management of the Beebe office than he had been in 1924? *A.* Yes. You understand the question of taxation refers only to A, B, C and D. It has no relation to what we call the big trust, the Frank Beebe Trust.

Q. Why is that? *A.* Because we only saved taxes on the A, B, C and D—the income taxes.

Q. Do you know that the position of the plaintiffs in this case is that the property conveyed under the big trust is not the subject matter of estate taxes? *A.* Who are the plaintiffs here?

Q. The plaintiffs here are the executors of the will of Frank Beebe. *A.* Oh, yes.

Q. But you do draw a distinction, do you, between Mr. Beebe's attitude and your own with reference to income taxes and estate taxes? *A.* Yes, no connection between the two at all.

Q. In other words, I am to understand that Mr. Beebe had the benefit of your advice and the expert advice of your partner with reference to all income tax matters affecting these trusts, but that so far as estate tax matters were concerned, Mr. Beebe never heard of them, I think you said, and you gave no advice whatsoever to him? *A.* On the A, B, C and D trusts there was a saving of income taxes by making them. On the question of estate taxes, so far as I can remember, there was no mention of them at any time during the process of drawing the papers or advising him.

Q. Don't you ordinarily advise your clients with respect to estate taxes, Mr. Welch? *A.* My partner, George Brown, is more apt to do that.

Q. Well, did he advise Mr. Beebe with reference to estate taxes? *A.* No.

Q. To your knowledge? *A.* Not that I know, sir. I don't think we were concerned in estate taxes in any way in this par-

ticular case. That was not the reason for making the trust deed."

The plaintiffs here are the executors of the will of Frank H. Beebe. There was a saving of income taxes by making the A, B, C and D trusts but no mention of estate taxes was ever made in connection with any of the trusts so far as I can remember. My partner is more apt to advise clients with respect to estate taxes than I am but he did not advise Mr. Beebe.

I am trustee of a great many trusts, but do not give advice to any of my clients as to estate taxes. My partner, George E. Brown, the brother of Sylvester Brown, does give such advice. Most of the trusts of which I am trustee are testamentary trusts, but there are a few living trusts although not many. I do not recall any estate tax in connection with these trusts, nor any litigation concerning the estate taxes.

Frank Beebe was an executor under the will of E. Pierson Beebe and as such was charged with the duty of filing an estate tax return.

"*Q.* Did you explain to Mr. Frank Beebe that he was filing an estate tax return? *A.* No, sir. I never saw him in connection with it.

Q. Do you know whether your associate explained to him? *A.* No, sir. I presume Mr. Sylvester Brown did."

I do not know when the first trust draft was discussed. It may have been in the spring of 1923 or in the summer or autumn. The general idea of a trust was discussed a long time before it was reduced to final form. We may have had a dozen drafts, but I have no memory as to the details of the various drafts.

"*Q.* Was the paper given to you, the draft of the trust given to you for your approval? *A.* I presume so. I do not remember.

Q. You do not remember? *A.* No. I remember very little that happened 10 years ago.

Q. Well, you remember— *A.* In details.

Q. You remember the details? *A.* I would not say I remember details 10 years ago.

Q. On this occasion when a client signs a transferring trust involving $3,700,000 you would consider a detail? *A.* Well, I must say yes, signing a deed does not particularly thrill me.

Q. Well, at any rate, you believe you read the trust? *A.* Oh, undoubtedly I read it before it was signed." . . .

"*Q.* To go back to my original question, Mr. Welch, if it were the main motive of Mr. Beebe, as you say, to merely unburden himself from the management of properties here, wouldn't that have been just as well accomplished by a trust drawn to trustees for his life, giving them the power to manage that trust without any specification of those persons who were to take after his death, such as the persons I have read from the trust instrument? *A.* Just exactly as easy.

Q. It would have amounted to the same thing, would it not? *A.* If he had wanted to.

Q. Then we must ascribe, must we not, to some other motive the naming of the specific persons? *A.* No, I don't think so.

Q. In your relation and in your discussion with Mr. Beebe over this trust what impression did you get or what do you know or what did you learn concerning the reason for Mr. Beebe's naming these specific individuals? *A.* He had to name somebody; they were the people who would be most in need of money at some future time. C. Philip Beebe, one of his heirs at law, if you want to put it on that basis, was very wealthy. E. Pierson Beebe, his brother, was even more wealthy than he was, and George S. Fiske, as far as I know, was also wealthy. The logical remaindermen would naturally be the children of his sister.

Q. I thought you said, though, that the same result, so far as the unburdenment of the management, could be accomplished by merely a trust to— *A.* They could; they could.

Q. You said he had to leave it to somebody. He didn't have to leave it in this trust instrument to somebody? *A.* Not necessarily.

Q. He could have left it in his will? *A.* Certainly.

Q. And they would have received his money on his death, if

they were in need of it? *A.* If there were any will, yes. A man can do many things under a trust deed. It happened to be his wish to do this in this way."

I advised Mr. Beebe with reference to his wills. The will was changed to avoid some duplication of gifts on account of property conveyed in the trust deed.

The persons who would have been Mr. Frank Beebe's heirs in 1924 were his brother, E. Pierson Beebe, his niece, Mrs. Hammond, his nephew, George Fiske, and his nephew, C. Philip Beebe. E. Pierson Beebe and, as far as I know, George S. Fiske were wealthy. The reason why Mr. Beebe named the persons he did as beneficiaries under the trust of E. Pierson Beebe's property was because they were the younger members of the family who would be most in need of funds eventually. I did not think about the effect which these trusts would have on the will. After the trust instruments were practically ready for signature it came to our minds that we shouldn't leave the will in that form.

I never heard of Mr. Beebe's operation before the execution of the trust on February 13, 1924. My associate, Mr. George E. Brown, wouldn't know any more than I would know. I had nothing to do with the income tax returns and don't know where they were made out. Mr. Sylvester Brown would know.

I can't remember whether at the time there was any discussion of the income tax return due March 15. I do not remember who prepared the income tax returns. I thought that my office prepared them, but I do not remember, and have been told since that we did not. I think the reason for Mr. Beebe's being added as a trustee was that he wanted part of the commission, also he wanted his name connected with the trust.

Mr. Beebe never gave me any idea that he feared that he might become mentally incompetent. Mr. George E. Brown is at present in Bermuda.

The amount of E. Pierson Beebe's property that was conveyed to the big trust was approximately equal to that owned by Frank Beebe himself then. Mr. Frank Beebe had made gifts, both large and

small. He had given $100,000 to Esther Fiske Hammond. I know nothing about the circumstances surrounding that gift. I do not know why Mr. Beebe did not name himself a trustee of the big trust on February 13, 1924. He was a trustee when that trust was confirmed because he asked to be,

Mr. Beebe's gifts varied from a suit of clothes to one hundred thousand dollars, but, as far as I know, there was only one gift of one hundred thousand dollars, the one to Esther Fiske Hammond.

On *redirect examination* the witness E. SOHIER WELCH testified substantially as follows:

I think that Mr. Beebe inherited about a million dollars and that under the management of his brother, E. Pierson Beebe, his property increased in value to two or three million dollars. E. Pierson was born July 4, 1843, and Frank was born June 5, 1853.

HENRY HIXON MEYER, a witness called for the plaintiffs, testified in substance as follows:

I graduated from Harvard Law School in 1919, was admitted to the bar in Massachusetts in 1920, and since then have specialized in real estate and probate law, connected with the firm of Rackemann, Sawyer & Brewster. In 1926 Mr. E. Sohier Welch sent me a copy of the instrument known as the "big trust", with a request that I examine it and advise the other trustee named in it, Mr. Brown, as to the validity of the trust. I understood Mr. Pierson Beebe had died shortly before. I did not know him and had only seen Frank Beebe a few times. I examined the trust instrument and advised Mr. Welch, in the opinion of our firm, it was not a valid transfer. This was my opinion because in 1924 Pierson Beebe was living and there was no way in which anyone could tell whether Frank Beebe would ever inherit any of the property from his brother.

The transfer attempted a present transfer without any covenants of warranty, so that as we saw it there was no way in which the trust could operate. I so advised Mr. Welch and Mr. Brown, and wrote a letter to that effect in September, 1926, and advised that it should be confirmed. Several days later Mr. Welch asked me to attend a meeting with Mr. Beebe at the Union Safe Deposit Vaults

and explain the situation to Mr. Beebe. Accordingly I met with him and one or two other persons, and I explained to Mr. Beebe why we thought the trust instrument was not a valid transfer, and Mr. Beebe asked me what I advised him to do. I told him that I advised him the instrument should be confirmed if he wished to have it take effect. His reply was he certainly wished to have it take effect because he wished to be relieved of the burdens of the management of this property. He told me to draw an instrument to confirm the transfer and asked me whether or not we could arrange it for him to be appointed a trustee.

He said he wished to be appointed a trustee because it was Beebe property and he would like to have the Beebe name connected with it. I told him how this might be accomplished by the resignation of one of the trustees named in the instrument and the appointment of that same person and Mr. Frank Beebe as trustees to fill the vacancy, making three trustees instead of two. Mr. Beebe stated that he wished Mr. Welch and Mr. Brown, who had been handling this property as guardians of E. Pierson Beebe, to continue that management. He stated that he himself had no intention of taking an active part in the handling of the trust affairs. I drafted the confirmation so called which was in the form of a deed and also the resignation of Sylvester Brown and the appointment of Frank Beebe and Sylvester Brown as trustees. I also attended to recording these papers in the Registry of Deeds. I was not present when the confirmation was executed. At the time of the meeting in the Safe Deposit Vault Mr. Frank Beebe was alert, active, had all the appearance of being an exceedingly healthy man.

I have made a comparison of the wills of 1922 and 1924. Both wills contained a vast number of legacies and there are numerous changes in these legacies. There were reductions in some and additions in other pecuniary legacies. Legacies to the Conservatory of Music, Symphony Orchestra, Industrial School, South End Music School and Harvard College were all reduced from $25,000 to $10,000. The Animal Rescue League was given a legacy in the 1924 will, but not in the first will and there were numerous other changes.

In both wills there was a trust of $100,000 to establish what was to be known as the Frank Huntington Beebe Fund for Musicians.

When I saw Mr. Beebe I observed nothing indicating any apprehension of death on his part. The subject of estate taxes was never mentioned. It is still my opinion that the conveyance in 1924 was invalid.

Upon *cross-examination* the witness HENRY HIXON MEYER testified substantially as follows:

The will dated March 18, 1932, was the one which was finally allowed, with a codicil.

The will of E. Pierson Beebe which was probated contained this clause:

> "*Sixth.* All the rest, residue and remainder of my estate, real and personal, of which I shall die seized and possessed, and to which I shall be in any way entitled at the time of my decease, and over which I now or may then have any power of appointment, I give, devise and bequeath to my sister, Emily B. Beebe and my brothers J. Arthur Beebe and Frank H. Beebe or such of them as shall be living at my death and the issue then living of any of them deceased, and if more than one in equal shares according to the stocks."

The date of this will was July 21, 1911.

[At this point counsel stipulated that in 1924 and at all times thereafter there was no issue of Emily B. Beebe; she had died; and the only issue of J. Arthur Beebe, who had died, was C. Philip Beebe.

[At this point it was also stipulated that the codicil to the will of E. Pierson Beebe dated July 15, 1925, contained the following clause:]

> "I revoke paragraph eighth of my said Will and in place thereof I provide as follows. I appoint my said brother Frank H. Beebe, and E. Sohier Welch, of Weston, in the County of Middlesex, and Sylvester Brown of Braintree in the County of Norfolk, and all in said Commonwealth of Massachusetts, executors or executor of my said Will, and I request that they and each of them be severally exempt from giving any surety or

sureties on their or his official bond, as such executors or executor. I ratify and confirm my said Will in all respects saving only in these wherein it is ordered [altered] by this codicil."

To the suggestion that despite the absence of a warranty provision in the deed of the "big trust", Mr. Beebe, the grantor, might be estopped from denying lack of title as the date of execution, I think the answer is there was no consideration for this conveyance and therefore estoppel could not work.

I am one of the attorneys representing the plaintiffs in this action, represented the plaintiffs in the settlement of the estate and the conduct of the tax matters, and assisted in the preparation of this case for trial.

Upon *redirect examination* the witness HENRY HIXON MEYER testified in substance as follows:

As I understand estoppel, there has got to be some action taken by someone in reliance upon the deed of trust which would be the basis for estoppel running against the grantor.

On *recross examination* the witness HENRY HIXON MEYER testified substantially as follows:

There was no equitable right transferred by the instrument of February 13, 1924, to the trustees or to the beneficiaries which under the law of Massachusetts could be specifically enforced in courts of equity.

Dr. FLETCHER H. COLBY, a witness called for the plaintiffs, testified in substance as follows:

I am a surgeon at 205 Beacon Street, Boston. I obtained a degree from the Harvard Medical School in 1918 and am a graduate of the Boston City Hospital, Peter Bent Brigham Hospital, and Massachusetts General Hospital. I have specialized in genito-urinary surgery.

In 1924 I was resident surgeon at the Peter Bent Brigham Hospital and, for that hospital, made a preliminary examination of Frank Huntington Beebe on February 29, 1924. Mr. Beebe was admitted to the hospital on that day. He gave me his history. He said that

he had no occupation. His family history was not particularly important as far as this case was concerned. He complained of increasing difficulty in urination. He said he at times had rather delicate health, but, except for intestinal trouble twenty-five years ago, he had never had any serious sickness. At that time he was told he had inflammation of the bowels, possibly appendicitis. He had frequent sore throats when a young man but none recently. He had never had any operations. The past history was otherwise entirely negative.

I also made an examination, which I recorded in detail. Among other things, I learned that there had been no trouble in the genito-urinary tract up to the present illness, but for some two or three years, at least, there had been some difficulty in passing his urine. This had very gradually increased. Seven to eight months ago he saw a doctor in London who catheterized him and told him he had seven and one-half ounces of residual urine. He had been provided with catheters to use himself should occasion arise, but he had never had to use them. During the next two months he had very little trouble, but about Christmas time he began to have further trouble in passing his urine, having to strain and frequently passing small amounts. At this time, during the course of physical examination, he was catheterized and was told that further investigation was necessary. He had never had complete retention of urine. He had not had marked frequency and had had no hematuria, and there had been no bleeding at any time.

The physical examination showed that he was a well developed and well nourished adult man, resting comfortably in bed in no apparent distress. The heart was entirely normal in so far as could be told by examination. The blood pressure was entirely within normal limits. If there was any arteriosclerosis, it was not significant. The prostate was symmetrically enlarged, elastic, not nodular and not fixed. My conclusion was that he was an individual in a rather unusually good physical condition,—the only abnormality being the enlargement of the prostate gland. I summarized the whole situation as follows: "A man of seventy-one years who has always been well and whose complaint at present is increasing diffi-

culty in emptying his bladder. The urinary symptoms have not been particularly marked, frequency and nocturia being slight. He has never had complete urinary retention. General physical examination is excellent. Impression: Benign hypertrophy of the prostate gland." That is non-malignant enlargement of the prostate.

I was an attendant at the operation and during his convalescence. He stood the operation exceedingly well, better than the average man of seventy. I saw him two or three times after he got out of the hospital.

I never saw anything in my observations that indicated any apprehension of death on his part. There was a perfect surgical result from the operation.

On *cross-examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

Mr. Beebe's urine contained pus. This was due to the enlarged prostate gland, with the presence of bacteria in the residual urine. On the second operation he was given ether, which is a general anesthetic. The cause of the second operation was a very unusual thing, which I have never seen occur before,—the mucous membrane of the bladder grew across the opening. A very small incision was made on the second operation.

"*Q.* Dr. Colby, from your experience would you say that an operation such as this—I am speaking of the first operation now—on a man of Mr. Beebe's age, with consideration of the excellent condition he was in—would you term that a major operation? *A.* Yes, sir.

Q. Would you term it a serious operation? *A.* I don't know what your definition of 'serious' is. Serious from what point of view?

Q. Is the operation possible of resulting in death? *A.* Any operation.

Q. Particularly an operation under general anesthetic? *A.* It carries the added risk of ether or the general anesthetic.

Q. Is there always a danger of shock present in a major operation to a man 70 years of age or more? *A.* Yes, sir."

On *redirect examination* the witness Dr. FLETCHER H. COLBY testified in substance as follows:

Mr. Beebe was in rather unusually good general physical condition. His condition generally had not suffered from his prostatic condition to any appreciable extent. He was a most excellent risk, and I expected him to come through the operation without any difficulty at all. My own experience of mortality in these operations is that it is considerably less than six percent. The general mortalities, which are taken, consider all operations. Mr. Beebe was definitely a good risk.

The fact that, at the time Mr. Beebe was examined by the London physician, he was suffering from a cold could account for the retention of urine at that time. The things which I found were all consistent with the enlarged prostate and were all typical of that. I discovered nothing unusual.

On *recross examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

There is not considerable danger of pneumonia resulting from an operation of that sort to a man of seventy, but it does occur occasionally.

There has been one very definite improvement in certain types of prostatic difficulty since 1924, termed prostatic resection. My mortality figures include operations up to a short time ago comprising this new method, but in Boston we have not done many of this particular type of operation.

On *redirect examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

The second operation was due to an unusual degree of healing capacity on the part of Mr. Beebe.

[At this point counsel for the plaintiffs read into the record the following letters from Frank Huntington Beebe:]

Letter of September 14, 1923, to Pierson Beebe from Frank Beebe:

"Dear Pierson: Mr. Brown and I yesterday made a thorough visit to Mrs. Samuel D. Warren's house at 261 Marlborough Street. The rooms are large and well furnished, with open fireplaces, and a great deal of sun, and the house has the great advantage of a lavatory on the first floor, and a lift to reach the master's chambers on the third floor. On the second floor

are two large parlors, the back one might be called a music room, where there is already a grand piano. There are plenty of bathrooms, plenty of maid servants' rooms, and the house is very fully furnished with rugs, books, lights, and some china if we want it. We are very favorably impressed with the house, and doubt if any other house in a convenient position could be found that would contain so many desirable features as this house does, for your comfort. When Mr. Brown heard of the house from Mr. Boardman, it had only been in the market a few hours, and it seemed to us so desirable, that we thought it was wise to act promptly, and we have therefore made an offer to rent the house for the winter. The offer has been accepted.

I expect to go back to Falmouth today. I hope this finds you well. Yours affectionately,

FRANK."

Letter of October 3, 1923, addressed to the Rev. Marcus H. Carroll:

"Dear Marcus: I have to thank you very much for your letter of September 24th, which I have hoped to answer each day for a number of days, but the sun has risen and set without my finding the right moment.

I am happy to say that I have been very well, so well that I have had a good deal to do. I am very glad to hear that Mr. Brennan is able to give you an afternoon ticket for the Symphony, so I am now enclosing my check for $45. for a seat, and $55. for the expense of coming, and going, etc.

I do hope that you will be able to bring Mrs. Carroll to see the 'Chauve-Souri' at the Shubert, which is really worth seeing, and much out of the ordinary, with the Russian coloring and costumes, and the pretty grouping.

I judge from your letter that you are really very well now, and having very little trouble with your interiors. I hope your better state may become a permanency. With my kind remembrances to Mrs. Carroll, and Miss Letitia, I am

Yours affectionately,

FRANK H. BEEBE."

Letter of November 14, 1923:

"Boston Opera House, Huntington Avenue, Boston, Mass.

Dear Sirs: I would like the refusal of four tickets for the Kreisler concert on March 3rd, from the second to the sixth row, left centre aisle preferred, with one an end seat. If you cannot give me seats on the left side, I will take them on the right side orchestra. Yours very truly,

FRANK H. BEEBE."

Letter of November 27, 1923:

"Symphony Hall, Huntington Avenue, Boston.

Dear Sirs: I enclose herewith my check for $22. for the tickets you are holding for me as follows:

Freida Hempel	4 tickets
Roland Hayes	4 "

Please send these to me in the enclosed stamped envelope, and oblige, Yours very truly,

FRANK H. BEEBE."

Letter of December 7, 1923, addressed to Mr. Sharp:

"Rev. James Clement Sharp, Falmouth, Mass.

My dear Mr. Sharp: I have just read your letter of December 6th in regard to the money for the apportionment of 1924. I think your suggestion of having an assistant secretary to look after the detail of the pledge system is a very good one, and it would be very agreeable to me if you could have that looked after in Falmouth, and then send the results each week, or when convenient, to me in Boston. I wish to acknowledge with thanks now the receipt of $155. this morning, for which I am now enclosing receipt. I will write you a little later in regard to my being present at the vestry meeting.

The annual parish meeting will be coming before very long, the second Tuesday in January, and if you know of anything special that we have to consider, I should be glad to know of it now, or of any special articles that are to go into the warrant.

I am pleased to hear that the Eucharistic lights were used on Sunday.

Will you kindly let me know at your earliest convenience how many one-half pound candy boxes will be needed for the Sunday School children, and the Sunday School teachers, and any other outside parties that we should like to remember. I have ordered the boxes but do not know exactly the number that we should like. I hope that you and Mrs. Sharp are keeping very well.

Yours sincerely,

FRANK H. BEEBE."

Letter of December 18, 1923, to Mr. Sharp:

"My dear Mr. Sharp: Thank you for your note of December 10th which has just come to me, telling me that there are seventy-five people to be remembered with boxes of candy. I am sending receipt for $5 from Mrs. Emma S. Davis.

I want to suggest that for Xmas day, would it not work very well if you had a morning service, say at nine o'clock, and then you and Mrs. Sharp could take the train and spend the rest of the day with your mother. I think one service at St. Barnabas would seem to suffice for the day, and I think that you should have the rest of the day with your mother, if you so desire.

The days between this and Xmas are few and full, and I am not sure that I can conveniently join you at a vestry meeting, so perhaps in the uncertainty of things, for I really have many things of importance to look after, it would be well for you to arrange for the vestry meeting at a time convenient for the Falmouth people, and if it so happens that I can come, I can let you know.

I am enclosing checks from my brother and myself for the Xmas festival, and am reminding Mr. Fiske, hoping that he will do the same. Will there be any more collections to come in from St. Barnabas for the 1923 Church Call quota. If so, I should be glad to know at a somewhat early date, as we have to know how much has to be made up to fill the quota before the end of December, and also, please let me know as soon as convenient, in regard to the warrant for the annual parish meeting.

The beautiful weather continues, and everybody should be well. Yours sincerely,

FRANK H. BEEBE.

Rev. James Clement Sharp, The Rectory, Falmouth, Mass."

Letter of December 18, 1923, addressed to Symphony Hall:

"Dear Sirs: Please reserve for me two seats for Friday evenings for the Burton Holmes lectures in row K or L on the right side of the right aisle, with an end seat.

Kindly advise my office the price of tickets, and I will send check. Yours very truly,

FRANK H. BEEBE."

Letter of December 18, 1923, addressed to Louis H. Mudgett:

"I write to ask you to reserve for me seats in the second or third row from the stage, left side of left aisle, with an end seat. I cannot say for which operas I would like tickets until I know what the operas are on the different nights. Can you send me the prospectus? Yours very truly,

FRANK H. BEEBE."

Letter of December 18, 1923, to Edward Farnham Greene, Boston-Chicago Opera Association:

"Dear Mr. Greene: I write to say that I shall be pleased to become a member of your Board of Guarantors for the 1924 season of the Boston-Chicago Opera Co. guaranteeing $500 in my name. With best wishes, I am,

Very truly yours,

FRANK H. BEEBE."

Letter of December 27, 1923, to Symphony Hall:

"I enclose herewith my check for $13.20 for two course tickets for the Burton Holmes lectures. Kindly send the tickets to me, and thus much oblige, Yours very truly,

FRANK H. BEEBE."

Letter of December 29, 1923, to Edward Farnham Greene:

"Dear Mr. Greene: Thanks for your letter calling my attention to my guarantee pledging $1,000 to the Boston-Chicago

Opera Association for the season of 1924, which it seems I made last March, and which I overlooked when I sent you a note lately pledging $500. Please consider the $500 pledge withdrawn in consequence of the larger pledge. I am,

Yours faithfully,

FRANK H. BEEBE."

Letter of January 4, 1924, addressed to "My dear Barnabas":

"I have within an hour received your interesting postal card of the pretty group in one of the parks.

I am especially glad to get something in your own handwriting, and know from you that you and your family escaped the terrible catastrophe. I hope that you are well. Of course you must have been very busy since the earthquake but when you do have a spare half hour, I hope you will write me and let me know a little about your experience. I am also glad to know that you got my two letters, and suppose that one of them is the one written on the Atlantic in August.

We have had a remarkably pleasant autumn with no snow until the first of January, and then very little. I am much occupied but keeping pretty well, and enjoying very much my new house, which is most comfortable, and where I have a spare room to which I can invite you. Is there any chance of your coming to these parts within six months? If you have any snap shots of yourself or your family, it would be most interesting to see them, and do you happen to know anything of our former guide, Kin Nagura? If you do, I should be so glad to have his address. Hoping that 1924 will be very kind to you, and that you will all keep well, I am,

Your old friend and traveling companion,

FRANK H. BEEBE."

Letter of January 7, 1924, addressed to Mrs. Philip B. Weld, Dedham:

"Dear Mrs. Weld: I have your letter in regard to Mitja Nikisch's recital for the benefit of the Children's Island Sanitarium.

I should like four seats, first row, first balcony, Nos. 11, 12, 13,and 14, over the stage, with an end seat.

Please find my check for $12 enclosed, and I shall be much pleased to give my name as a Patron.

Yours sincerely,

FRANK H. BEEBE."

Letter of January 8, 1924, addressed to Mr. Mudgett of the Boston Opera House:

"Dear Sir: I enclose herewith my check for $182 for which please send me opera tickets as follows:

3	tickets for	January	30th	(Matinee)	'Sniegurotchka'
4	" "	"	30th	(Evening)	'Barbiere Di Siviglia'
2	" "	February	1st	(")	'Carmen'
2	" "	"	2nd	(Matinee)	'Boris Godunoff'
4	" "	"	2nd	(Evening)	'Faust'
4	" "	"	5th	(")	'Sniegurotchka'
3	" "	"	6th	(Matinee)	'La Traviata'
2	" "	"	7th	(Evening)	'Boris Godunoff'
4	" "	"	8th	(")	'Manon'

"Seats to be in the second row from the stage, left center aisle, one an end seat.

Yours very truly,

FRANK H. BEEBE.

By C."

Letter of January 12, 1924, to Mr. Sharp:

"My dear Mr. Sharp: Before me is your note of January 10th in regard to the prayer books, which, I am sure, must be much needed. It seems most likely that if no leaf is inserted at the front of the book before they leave the Old Corner Bookstore, it will not be done. Now I have misplaced your kind suggestions that you sent me many weeks ago and I cannot put my hand on them now. If you were to send me these again, it might be that they could be put into the books at short notice. Would you like to do that?

I have received a check for $41.75 signed by George E. Dean, marked 'Envelope collections for January 6th' which

seems to require more data as to how the money was contributed and for what object, so that it may be explained on the books.

I am sending you two copies of the contract with the organist as we thought well to have it, and would suggest that you get both copies signed, so that you may keep one and Miss Kershaw the other. I suppose you would like to see her personally and talk matters over, and I should think it very important that she understand *all* that she is expected to do, and that she be reminded that a greater interest in her work generally would help matters very much and be appreciated. If I can assist you further in this matter, or if any points come up, will you kindly let me know.

I went over the church and St. Barnabas House quite thoroughly with McKilligan the other day. I sent word to the mason to come and attend to the plastering in the cellar of the church, and also to Mr. Howe to come and make a new bulk head door to the church outside staircase, and also arranged with McKilligan to paint the basement of St. Barnabas House a yellow and red, as you and I thought would be very nice. I also yesterday asked Warren Davis to see McKilligan in regard to the window shades for St. Barnabas House, which I discussed at length with McKilligan. The iron pipe for the porch lantern I have brought to Boston, and will see what can be done about it.

We still have the matter of the church windows, and the lighting and the hymn board to consider, all of which takes time.

Hoping this finds you in good spirits, and with my remembrances to Mrs. Sharp, I am, Yours sincerely,

FRANK H. BEEBE."

"Monday, January 14, 1924

P.S. I have spent one-half hour this morning at McKenney & Waterbury's and as a result, I am sending to McKilligan, a new bit of piping and burners, which, while not exactly the size of the old one, can, I hope, be made to work for the lantern."

Letter of January 15, 1924, to Eric H. Waterlow:

"Dear Sir: I am very sorry that this letter should reach you so long after the plants, which you so kindly sent me. Your name was not on the parcel, and I had mislaid the notes that I made when I was in Manchester so that I was obliged to wait until I could get your name from my gardener, Nils Carlson. It was very nice of you to remember and take the pains to send me the plants, and I am glad to tell you that they are doing well in my greenhouse, so that I suppose I may look for blooms in the spring. Wishing you a very comfortable and successful year, I am,

Yours very truly,

FRANK H. BEEBE"

Letter of February 7, 1924, addressed to Nils Carlson:

"Nils: I have your statement before me, the last date of which is February 1st. I notice that a good deal of time has been spent down near the railroad station in cleaning up. All the men seem to have worked two days down there. You ask about the fence. I think the fence had best be repaired, and you better go on and do it when the weather is suitable. I think as a rule it is better not to put all the men on one job at a time but rather two and two.

The seed list I have not had time to look over, as I have been keeping rather quiet the last ten days. Have the dead trees in the Celia D. Robinson lot been cut down, which I pointed out to you a good while ago, and the gutters swept out, and roads left in the proper condition, and the water turned off.

I am sorry not to have more flowers, and hope that as the weather gets warmer, we may have them twice a week.

In writing the weekly statements, you might say where you are creosoting, and where you are chopping, and also let me know how Alfred is since his visit to the doctor in Boston. I hope Mrs. Carlson and you are very well.

Yours truly."

Letter of February 15, 1924, to Mr. McKilligan:

"Your good letter of February 13th was at hand, yesterday. I am very glad to know that the work has gone on so well, and that the lantern for the porch has been made to work. I have forgotten about the other lantern that you refer to, and do not remember just what was needed to be done to it, but if you can get it arranged, I think you had better do so. I am sure the painting of the basement must make it look very fresh and attractive.

I am feeling much better for the vacation I have had, and hope that you and your family continue to be very well.

Yours very truly,

FRANK H. BEEBE

by M L C"

Letter of February 18, 1924, to Nils Carlson:

"I received by Miss Robinson the very pretty Amaryllis lily from Highfield. As I have mentioned to you before, I want you to inform me of any special blooms that are coming along. I want to know when the Amaryllis and Gardenia, and any other special things are coming in bloom. Do not forget to mention this in your letters.

The seed list I have given a good deal of time to and will shortly send you a copy of the order. I hope before long we shall have some tulips from our greenhouse, and some other things.

Have all the teams been painted, and put in good order? I do not know if you have had the saw yet for the wood, but you can do so as soon as convenient.

I should like to go to Falmouth in this beautiful weather very much, but I am still keeping rather quiet. I hope that everything is going on well there. Yours truly,"

Letter of February 18, 1924, to Mr. Arnot:

"Dear Sir: I had the pleasure of a visit to Mr. Webster's greenhouses yesterday, and enjoyed very much seeing the beautiful things. The pink Amaryllis, which I thought very pretty,

was new to me, and also the red and yellow Freesia, which I had not seen before. What a beautiful shade of yellow. Would you kindly let me know what the group of plants in the last lefthand greenhouse is. I think I have asked you before but I have forgotten. They were blooming in all colors, and took my fancy very much. Hoping this is not troubling you too much, I am, Yours truly,"

Letter of February 19, 1924, to Lilian Olzendam:

"Dear Mrs. Olzendam: I have your clearly written very legible letter from the Underwood typewriter.

I shall hope to be able to hear Mr. Dalbeck on Friday evening. You mention a string quartette. I hope this does not mean that the piano is left out. I should be very sorry for that, and you do not mention the hour.

I think if Mr. Beebé's russet shoes are stained a little darker shade he will not object to wearing them with his morning suits, and they would look very well.

Yours sincerely,"

February 19, 1924, a letter consisting of three pages of various flowers, or orders for various flowers, giving a description of the kind of sweet peas, zinnias, asters, pink asters, carnations, daisies, petunias, phlox, salvias, and sweet peas, with the letter of February 20, 1924, to Nils Carlson:

"I am sending you under separate cover the Dreer catalog from which I sent an order for seeds yesterday, as per the enclosed list. On the list which you sent, and which I am also returning to you, I have marked with a cross those that I have not included in the order to Dreer, and for which I have substituted other things. You will notice on the list some seeds that are marked to go to Joaquin. Please let me know as soon as the order arrives. Yours truly,

FRANK H. BEEBE
by M. L. C."

[At this point counsel for the defendant read into the record a

letter dated January 15, 1927, from Frank H. Beebe to his niece, Mrs. Esther Hammond:]

"Anent our previous family conversations concerning Uncle Pierson's choice by will in the disposal of the residue of his estate, I am inclined to think that a careful study of the instrument reflects very accurately the reasons why he made the provisions he did. At the time he had his will drawn in 1911, his brothers and sister then living were Sister Emily, Brother Arthur and myself, and as he had taken care of all of his nieces and nephews by general legacies of $50,000 each, he bequeathed by the sixth clause of the said will the residue of his estate specifically to his brothers and sister as named, if they should survive him, and the issue then living of any of them then deceased. Of course he could not foresee future events and developments at that time, and thereafter never made any change in the residuary clause of the will, which was allowed by the Probate Court on September 14, 1926. It might be assumed that had your mother not died some 20 years before he executed his will, she might have been included in the residuary clause, but at any rate he named as residuary legatees his then living brothers and sister as aforesaid.

"In February, 1924, when attending to various matters pertaining to my own personal accounts and estate, I drew a Deed of Trust which was to take effect in practise if I should survive Uncle Pierson and if I received anything from his estate either by will or, if surviving him he died intestate, at law. This instrument was executed February 13, 1924, and to absolutely clear the title to the property, was confirmed by a Deed attached and recorded with the original shortly after Uncle Pierson's death. The Messrs. Welch, Brown and myself are the Trustees named in this Deed which is irrevocable, and by its provisions I am only able to use the income from this fund from Uncle Pierson during my lifetime.

I hope that the above two paragraphs will make clear in your mind some of the problems and questions which may have been troublous lately. Affectionately,"

At this point counsel for the defendant read into the record a letter dated June 11, 1927, from Frank H. Beebe to William H. Dunbar, Esquire, 161 Devonshire Street, Boston, Massachusetts, as follows:

"Dear Mr. Dunbar: Thank you for your letter dated June 3d concerning Mrs. Hammond's balance now in your hands. I am sailing for England Sunday on the 'Laconia' and inasmuch as I have just made a present of $4,000 to Frances Hammond I have no plans at present for any further gifts to the Hammond family. Yours very truly,

P. S. I think it would interest you to know, if you have not already been told, that at last Christmas time I made Mrs. Hammond a gift of $100,000."

At this point counsel for the defendant read a letter from Frank H. Beebe dated October 11, 1923, as follows:

"Mr. Frank H. McCulloch, 232 South Clark Street, Chicago, Illinois.

Dear Sir: Your favor of October 8th is duly received in regard to your and Mr. Hammond's proposed visit to Boston.

We fail to understand the necessity of Mr. Hammond's incurring the expense of a second visit to Boston after his recent lengthy conferences with Messrs. Welch and Brown. Mr. Sylvester Brown, my representative, is to be away from Boston until the end of October. Should it seem to Mr. Hammond and to you that a further conference is desirable with yourselves and Messrs. Dunbar, Welch, Brown and Tyler, no doubt a date in the early part of November can be arranged which will be convenient for all these gentlemen.

Yours very truly,

FRANK H. BEEBE"

JOHN WALLACE GOODRICH, a witness called for the plaintiffs, testified in substance as follows:

I am director of the New England Conservatory of Music and have been since January 1, 1931. I became a member of the faculty of that institution in the fall of 1897, and from 1907 until 1931

was dean of the faculty. I knew Mr. Beebe from about 1890 until the time of his death. He became a trustee of the Conservatory in December 1928. I saw him occasionally from 1920 to 1932. He seemed to be in good health and to take a keen enjoyment in life. He took an interest in the welfare of the students, in being of help to them, and one of his particular means of happiness was his hearing of music. He was a regular attendant at concerts of various kinds. He came frequently to the Conservatory concerts and to other concerts. He expressed himself about programs and performances in a way which showed a very keen interest, and, from the portion of his music library which came to the Conservatory, I was struck by the very excellent character of the music which evidently he had been using. He showed his interest in students of music by having them frequently at his house and by giving financial assistance. He contributed to the fund for the new building for the Conservatory and also made other contributions.

I never observed anything that indicated an apprehension of death on the part of Mr. Beebe.

SYLVESTER BROWN, a witness called for the plaintiffs, testified as follows:

I live in Cambridge, Massachusetts. I am one of the executors of the will of Frank H. Beebe, and, as such, one of the plaintiffs in this case. I first met Mr. Frank Beebe in the spring of 1921, when I went to the Beebe office at 6 Beacon Street, Boston, as office manager. I have remained in that office ever since. All the Beebe accounts were handled in the Beebe office. As office manager I supervised the general routine of the business and managed the real estate.

When I first came there Frank Beebe was one of the guardians of the estate and person of his brother, Pierson Beebe, and also a trustee under the will of his father James M. Beebe. Frank Beebe kept track of the business in a general way. He signed the investment checks until I had power of attorney. He liked to sign the salary checks. He would talk business at intervals and sometimes he would attend the coupon cutting. But, after 1922, when he gave me the power of attorney to sign his checks, I signed most of the checks and attended

to his business as fiduciary, in so far as he did not delegate any discretionary power. After 1922 he did not come to the office regularly. When he was in town he probably came three or four times a week from about eleven o'clock until one, and in the afternoon he was quite likely to come in for a while to sign personal letters which he had dictated in the morning. In later years he came in earlier in the morning and did not come in the afternoon. He never was in the office throughout the regular office hours, nine to five. After I had the power of attorney his visits to the office became less frequent. He went abroad in 1922, 1923, 1925, 1926 and, I think, 1929.

The number of the safe deposit box at the Union Safe Deposit Company in which Mr. Frank Beebe's personal securities were kept was A536. The securities belonging to the estate of Pierson Beebe, of which Frank Beebe was one of the guardians, were kept in the same box.

At this point the testimony of the witness was interrupted to take the testimony of GEORGE G. BRADFORD, a witness called by the plaintiffs, who testified substantially as follows:

I am manager of the Union Safe Deposit Vault in Boston, and have been for thirty years. We keep records showing when access is had to safe deposit boxes in our vault. I have looked at the records to see how often access was had to box A536. Sohier Welch, Sylvester Brown and Mr. Beebe had access to this box. Any two of those three could go. Our records indicate that during 1923 box A536 was opened eleven times and that on only two of these occasions did Mr. Beebe go to the box.

The witness SYLVESTER BROWN then resumed his testimony and testified substantially as follows:

The trips abroad made by Mr. Frank Beebe were anywhere from three weeks in 1923 to four months and a half in 1926. Pierson Beebe died on August 8, 1926. I cabled to Frank Beebe, who was abroad. He did not return at once, but sailed on August 26, his regular sailing date, and did not get back until the early part of September.

After 1922, whenever Mr. Beebe was in Massachusetts, I should say that he came to the office about three times a week, except when he was at Falmouth, and when he was there he came about once in every ten days or two weeks. When Mr. Beebe came to the office during the year 1923 he would usually call me into his office for about five minutes and talk over general matters, and after that he would spend the rest of his time with his private secretary dictating personal letters, and attending to his own mail, and attending to his private business. He would make out programs for musicals and send out invitations. There were long periods of time when he would not discuss business matters with me at all, even though he was coming to the office, unless I became insistent. There were such periods lasting sometimes two or three weeks. He several times said things indicating that he did not want to talk business. He also told me very frequently that he disliked business details.

I had a conference or two with Mr. Beebe in regard to the trusts which are known here as A, B, C and D trusts some time between January 1 and January 15, 1924, to the best of my recollection. He discussed the various beneficiaries and the amounts. I am acquainted with all of the beneficiaries of the trusts except Mrs. Katherine Reed Tisdale. Archibald Reed Tisdale was a very close friend of Mr. Beebe and his family. The income which was to be paid from the trust to him was, roughly, about four hundred dollars a year. Henry Herbert Smythe was minister for many years at St. Barnabas Church in Falmouth and was a very close friend of Mr. Beebe. Mr. Beebe had made gifts and other provisions from time to time to him. George Gooding was the coachman and caretaker and Mr. Beebe had made gifts to him in the past. The trust, of which they were beneficiaries, was terminated before Mr. Beebe's death, after the death of Mr. Smythe, and one-fifth of the principal was actually turned over to Mr. Beebe during his lifetime.

Mary Van Arnam Brown, who was beneficiary of trust B, died before Mr. Beebe. Up to the time of her death the entire net income, approximately between $4500 and $5000 a year, was paid to her. She was a first cousin to Mr. Frank Beebe, a maiden lady of very moderate means. Before this trust was made Mr. Beebe every year would

augment her income to give her sufficient income to live on, and paid her rent direct, and she spent the entire summer and fall with him at Falmouth.

The principal amount of trust C was $125,000. $1500 a year income from this was paid to Constance Tippett. She and her mother before her were friends of the entire Beebe family and Mr. Beebe had made many financial contributions to her.

Katherine Tisdale was the mother of Archibald Tisdale. Mary Louise Cummings, who received $1200 a year from the income of this trust, was Mr. Frank Beebe's private secretary over a great many years and he had made frequent contributions to her. Albert E. Rhodes was one of the old scriveners in the office. He had been there forty-five years. Mr. Beebe helped him with hospital bills and medical bills and clothing.

Sarah B. Field, who received income under trust D, died before Mr. Beebe and the principal of that trust fund was paid over to me and Mr. Welch, who were trustees under the trust for Constance Tippett and others, prior to Mr. Beebe's death, so that trust C absorbed trust D. Miss Field was a school teacher and Mr. Beebe had made gifts to her before the creation of these trusts.

George Fiske Hammond was a grand nephew of Mr. Beebe. Esther Hammond was a niece of Mr. Frank Beebe and Mr. Beebe had made gifts to her in the past. George Fiske Hammond was a son of this Mrs. Hammond. Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond, and Mary C. Hammond were children of Mr. Beebe's niece, Mrs. Esther Hammond. At the time of the creation of the trust most of them had recently become of age. Generally speakiing, they were in or about the twenties.

Trusts A, B, C and D were set up on my books February 18, 1924, and the property had been received shortly before that.

[At this time counsel for the plaintiffs introduced in evidence form of receipt which the witness identified as being used for trusts A, B, C and D. This was marked "Plaintiffs' Exhibit 12". Counsel for the plaintiffs called attention to the fact that on the form of receipt it appears very prominently that Mr. Beebe was the creator of the trust.]

The witness continued his testimony and testified substantially as follows:

Mr. Beebe wanted these beneficiaries to know that Mr. Welch and I were the trustees but that he was the donor, and he wanted his name to appear in connection with it.

The real estate in the large trust, which we called the "F. H. B.", was set up on our books in December 1926. I think it was in April, 1927, when we received the securities. I and my co-trustees or trustee administered the property which we received under that trust in accordance with the terms of the instrument which is in evidence as Exhibit 7. We filed a copy, or an original, of that instrument in the Registry of Deeds of Suffiolk County in Boston.

[At this point it was stipulated that the two instruments, the one dated October 22, 1926, signed by Mr. Frank H. Beebe, and the instrument which that confirms, dated February 13, 1924, and also papers in regard to the resignation and appointment of trustees, which were in evidence as Exhibit 8 (those being dated also October 22, 1926), were all received and entered by the Registry of Deeds of the County of Suffolk on October 23, 1926.]

The witness continued his testimony and testified substantially as follows:

I filed the originals of those instruments, and the trustees under that trust have filed accounts every year, and they have been allowed and the items finally adjudicated. We have also administered trusts A, B, C and D according to their terms. We filed copies of the declarations of those trusts, evidencing those trusts, in the office of the Registry of Probate of Suffolk County and we filed accounts, and those accounts have been approved by the court.

Going back to 1924, Mr. Frank Beebe did not discuss with me the creation of this trust relating to the property of Pierson Beebe and I had nothing to do with the formation of it. I saw Mr. Frank Beebe shortly before he went to the hospital but did not know he was going to have an operation until two or three days before that. From what appeared to me I thought that Mr. Beebe was well. When I saw him two or three days before he went to the hospital he was a trifle irritable, but he was quite apt to be so. Except for that,

I did not notice anything out of the usual with him. Mr. Beebe, neither at that time nor at any time before his operation, indicated in any way to me that he contemplated death or that he was doubtful as to whether he was going to live on. I saw him ten days or two weeks after his operation and frequently after he recovered. His health was better than ever before. At no time during 1926 do I recall that he said anything indicating that he contemplated death or that he might not have long to live. I must have received instruction from Mr. Beebe that caused me to write a letter to Symphony Hall dated March 4, 1924.

[At this point counsel for the plaintiffs introduced this letter in evidence and it was marked "Plaintiffs' Exhibit 13". Counsel for the plaintiffs then read into the record this letter, which read as follows:

"Symphony Hall, Boston, Mass.

Dear Sirs: Will you kindly reserve for Mr. Frank H. Beebe's refusal four seats for Chaliapin who appears, I believe, some time during the middle of April. Please make the reservation in that part of the balcony where seats are usually allotted to Mr. Beebe. Yours very truly,

SYLVESTER BROWN."

[At this point counsel for the plaintiffs introduced in evidence a letter from Sylvester Brown to Frank H. Beebe, dated October 20, 1926, which was marked "Plaintiffs' Exhibit 14".]

This letter was read as follows:

"Dear Mr. Beebe: Our real estate attorney, Mr. Henry H. Meyer, of Rackemann, Sawyer & Brewster's called me up this afternoon to find out if you had as yet signed the confirmatory statement attached thereto and now a part of the Deed of Trust which you executed in February, 1924. The reason for his inquiry was because the party wall agreement at the property numbered 7 and 9 Newbury Street must now be executed and this cannot be done until your deed has been made a matter of record, thus clearing the title.

He spoke of having the Deed tomorrow and I told him I thought you would sign tomorrow morning after my explanation.

Another reason why this should be done immediately is on account of the lease for the first floor and basement, which must be signed in the near future. As you know, the trustees which you named were Mr. Welch and myself, the entire net income to be paid direct to you quarter-yearly during your lifetime and thereafter as you have directed. Yours sincerely,

SYLVESTER BROWN.

Please see postscript.

P. S. When you and I were studying your Deed of Trust some weeks ago you intimated that inasmuch as you had not appointed yourself to act as trustee with your appointees you had estopped yourself from benefiting in the trustees commissions on income on property which you would have owned outright except for the Deed. I feel very sure that you, Mr. Welch and I can make some arrangement concerning this phase of the matter which will be mutually satisfactory. S. BROWN."

The witness thereupon continued his testimony and testified substantially as follows: The statements in that letter are true and the arrangement mentioned in the postscript was made. One-third of the commissions on the income were paid to Mr. Beebe as trustee during his lifetime. The rate of commissions was just the same on the other trusts, but Mr. Beebe did not receive any of the commissions. The result of Mr. Beebe's being appointed trustee was that the total commission was the same as if he had not been, but that Mr. Beebe got part of the commission.

I was one of the executors of the estate of E. Pierson Beebe. I became his guardian, I think, during 1924. Mr. E. Pierson Beebe, though under guardianship, had a very keen mind and asked all sorts of questions about his real estate, his bank account, and his securities. He had also a very keen memory. Two or three times he stated to me that the father of Mr. Sohier Welch, Mr. Francis Welch, whom he had appointed executor of his will, had died, and he stated that he was not particularly well acquainted with Mr. Hooper, the other executor appointed by his will in 1911, and told

me that, since Mr. Frank Beebe and Mr. E. Sohier Welch and I were handling his affairs, we should be appointed executors. One time, when I was at Falmouth, on July 15, 1925, Mr. Pierson Beebe brought up the subject again and stated that he wished us three appointed executors, and I, accordingly, dictated the codicil and he executed it there. Mr. Frank Beebe was abroad at the time and, as far as I know, he did not know that he had been appointed until after his return from abroad. Mr. Frank Beebe had never acted as an executor or an administrator until the death of Mr. Pierson Beebe. I saw Mr. Frank Beebe after 1926 and he was "a well man".

On *cross-examination* the witness SYLVESTER BROWN testified substantially as follows:

I was not intimately connected with the discussion of the real estate trust of the James M. Beebe estate, which was abandoned in 1926. I did act as a go-between. I did not prepare the income tax returns of Mr. Beebe. They were prepared by certified public accountants under my supervision. Mr. Frank Beebe signed his own returns, and I signed the trust returns. The returns were made out by certified public accountants and he must have scanned them. There was no discussion of tax affairs other than those with reference to the real estate trust during the time approximating the execution of the five trusts in February, 1924, as far as I know. I do not know whether such taxes were discussed at that time.

Mr. Frank Beebe had made a gift of $100,000 to Mrs. Esther Fiske Hammond. There was no other gift as large as that. He had given a gift of $10,000 either to Mrs. Hammond or one of her children. Most of the gifts that Mr. Beebe made involved not more than $100 or $200. He often gave opera tickets and other gifts. Under the will of Frank H. Beebe I received a legacy of one thousand dollars in cash, and under the first clause of the will, with Mrs. Elizabeth Hammond, I was left all of his tangible personal property to dispose of in our discretion as he would have liked us to dispose of it, plus $2000 for operating expenses.

Mr. Frank Beebe's dislike for business was a continuous thing from 1922 on. After I first knew him in 1922, he never was a very

active man. He never had any business and was never active in the management of property. Mr. E. Pierson Beebe was entirely different from Mr. Frank Beebe and was a man of intense activity. After Mr. Frank Beebe and Mr. Sohier Welch became trustees of the trust under the will of James M. Beebe, Mr. Welch was the active trustee, although the books were kept in the office of Mr. Frank Beebe. After I had "found myself" in 1921, I took over a good many of the details of the property management from Mr. Beebe.

My activity in regard to the formation of the A, B, C and D trusts was due to the fact that I knew the persons involved and their needs.

On *redirect examination* the witness SYLVESTER BROWN testified substantially as follows:

The gifts to Miss Mary V. A. Brown aggregated at least $1200 a year and, although gifts to some of the other people were probably small at any single time, they were substantial in the aggregate and included trips abroad.

George E. Brown is in the South at the present time. As far as I know, Mr. Beebe never consulted him personally.

At this point it was stipulated that, if judgment is to be for the plaintiffs, it should be for such an amount as may be agreed upon by counsel, and, in the event of their failure to agree, such amount as the court should determine.

It was also stipulated by counsel that in March, 1935, there was assessed against the plaintiffs as executors of the estate of Frank H. Beebe an additional tax of $514,718.92 plus interest of $41,544.17, a total of $556,263.09.

At this point the plaintiffs rested.

Counsel for the defendant then introduced in evidence documents marked "Defendant's Exhibits D," "E", "F", "G", "H" and "I". Defendant's Exhibit F is the same as Exhibit A annexed to the plaintiffs' declaration; Defendant's Exhibit G is the same as Exhibit C annexed to the plaintiffs' declaration; and Defendant's Exhibit H is the same as Exhibit D annexed to the plaintiffs' declaration.

At this point it was stipulated that Defendant's Exhibit I, a letter from the Deputy Commissioner to Rackemann, Sawyer and Brewster,

dated October 5, 1935, was an answer to the request of the executors of the estate of Frank H. Beebe, dated September 25, 1935.]

At this point counsel for the defendant read into the record a letter dated May 26, 1923, reading as follows:

"Dear Mr. Muhlbauer: Your letters have come quite regularly and often, and I have to thank you not only for the interesting accounts of what you are doing, but also for the gay and interesting effect of the stamps.

I have wished to write you several times but the pressure of other things has prevented. It is interesting to hear just what you are doing, and how your days are spent.

Our place at Falmouth now is looking very lovely indeed, and the gardens give great promise of blooms soon. I think the plants have gotten through the winter rather better than we have, as they do not seem to be sick at all, and are coming up very strong and fine.

Our symphonies were over the first of May, and the popconcerts are now going on, and are very good.

Only two days ago I went to a beautiful horticultural exhibition in two big tents in Brookline. You would have enjoyed the flowers, as they were contributed by four of the best gardeners thereabouts.

I enclose a little clipping from a paper for you to read. We do not hear very much just now about the disturbances in the Ruhr, and perhaps the people there have decided to go on quietly with their work, and do the best they can for the French.

When is your next birthday, and if you do not mind, how old will you be?

Is your piano in good order now, and are you expecting to go to Bavaria for the benefit of your health?

I do not know that you really need it, but I think I will enclose $10 for you, and shall be glad to know if it reaches you safely.

Next time I write I will try and tell you the number of letters and postal cards which you have kindly sent, all of which I think have come safely to hand.

I am just ordering some new Dahlia bulbs to put with my personal collection, which will be very interesting.

Yours very truly,

FRANK H. BEEBE."

In answer to a question of the court, the witness SYLVESTER BROWN stated that Mr. Muhlbauer, the addressee, was an old friend of Mr. Beebe living in Germany.

JOHN B. MADORE, a witness called for the defendant, testified in substance as follows:

I am and since 1922 have been internal revenue agent on estate tax investigations. In connection with the investigation of the estate of Frank H. Beebe I interviewed Dr. Seabury W. Allen early in 1932.

At this point the testimony of the witness was suspended and the witness Dr. SEABURY W. ALLEN, who had previously testified for the plaintiffs, was recalled for cross-examination. Upon *cross-examination* the witness, Dr. SEABURY W. ALLEN, testified substantially as follows:

I remember having an interview with an internal revenue agent. In this interview I said that I saw Mr. Beebe occasionally, but not every day for a month or two, and not for nervousness, but for various very trivial matters. I think the so-called nervousness was an unimportant matter. Mr. Beebe was not losing sleep considerably because of nervousness. I never said that Mr. Beebe was an invalid type of man, always nervous and complaining, always afraid he would go insane because there was insanity in the family. I remember saying, in substance, that his two brothers and sister became insane and that a cousin was in the insane asylum. I recall only one occasion on which Mr. Beebe spoke of mental difficulty and that was after his brother's commitment to the hospital, when he asked, "Are we all going that way?" Mr. Frank Beebe had a hollow back due to bad posture. There was nothing defective about it. It became aggravated over a period of time and caused a hollow spine.

He walked extremely well. I do not remember saying that he walked with difficulty. I do remember stating that Mr. Beebe had a bad bladder trouble and had a prostate operation performed by Dr.

Quimby of the Peter Bent Brigham Hospital, and that my old records were stored away and were not accessible so as to give me the date. I do not remember saying that Mr. Beebe was very seriously ill at the time of the prostate operation. I could not have said that because he was not seriously ill. I do not remember whether I told the inspector about hernia, but it is a fact that Mr. Frank Beebe did have a hernia early in 1930, but it did not call for an operation. It never disappeared. Treatment was given for it until his death. I do not recall stating that Mr. Beebe had developed hardening of the arteries but that I could not recall the exact date when this began.

The only hardening of the arteries which I was aware of occurred just prior to his death, possibly in September of the year he died. He may have had arterio-sclerosis before that time without my knowledge. That is universal in all people of his age. It is true that he was getting weak toward the end, but he had no symptoms that alarmed me. It is not true that Mr. Beebe was ill for a year before he died. I do not remember saying that he may have expected insanity or that I did not believe he contemplated death except possibly the last two years of his life. I did not have any other interviews subsequent to this time with Mr. Madore or any other government representative. I recall the one interview but not at all clearly.

In answer to questions of the court the witness Dr. SEABURY W. ALLEN testified substantially as follows:

Mr. Frank Beebe was a nervous type of individual, I suppose congenitally. His nervousness was nothing specific. The type of hernia which he had was double inguinal, both sides. The treatment which I prescribed was a truss. When he used the truss there was no danger of strangulation and he was perfectly comfortable.

On further *cross-examination* the witness Dr. SEABURY W. ALLEN testified substantially as follows:

I received a legacy of $5,000 under Mr. Frank Beebe's will.

At this point the witness JOHN B. MADORE was recalled for further *direct examination* by the defendant and testified substantially as follows,—the court admitting his testimony only as bearing on the credibility of Dr. Allen:

I made a copy of a report right after interviewing Dr. Allen. I made notes when I was talking and made this report from my notes. Dr. Allen stated that he had treated the decedent for nervousness for 25 years, and sometimes would see him every day for a month or more, then perhaps would not see him for several months afterwards, when he would have to start over again. He described the decedent as an invalid type of man, always nervous and complaining and afraid that he would become insane because there was some insanity in the family. Dr. Allen named two brothers and a sister and a cousin who had become insane.

Dr. Allen stated that the decedent used to ask him if he would go insane, and he would try to talk him out of it, advise him to travel abroad, go to the theatre, and not to think of himself. He said the decedent had a weak back and walked with difficulty but that up to a few years before his death he was able to go to his office. He said the decedent had a bad bladder trouble; that he had a prostate operation performed by Dr. Quimby at the Peter Bent Brigham Hospital. He could not recall the exact date of the operation and suggested that I go to the hospital and get the record there, which I did. There was some confusion about the dates. He could not recall exactly when it was that the operation took place; he thought it was either 1920 or 1922. I asked him about 1924 and 1925, and he thought that the decedent was all right at that time, that he had recovered from the prostate operation, although he said he was seriously ill at the time.

I asked him to consult his own records about that time and he said they were not accessible, and it seems to me that he said they were packed away, or something like that. He spoke of his having a hernia four or five years before his death, but didn't want to be operated on for it. He also spoke of his hardening of the arteries, but he couldn't recall when that was. He said his heart was getting weak towards the end, but he had no symptoms that were alarming him (I think the "him" refers to the decedent, Mr. Beebe), and that about a year before his death Mr. Beebe became very ill with his heart and was ill until he died. He did not believe that the decedent,

Mr. Beebe, contemplated death, except possibly the last two years of his life, but he may have expected insanity.

On *cross-examination* the witness JOHN B. MADORE testified substantially as follows:

I first began to investigate the Beebe estate case in the early part of the winter of 1932—some time between January and May, because my report was made in May. I have not my original notes with me and I do not know where they are. I should have to look, but I have not had a chance to look them up. I have been interested in this case ever since there was a question about the estate, and I have been present at all the hearings and had had many conferences with Mr. Meyer. I do not know whether I had those notes at that time. I was conscious of the existence of this report at that time and I saw the various affidavits in the case at the hearing, and I think that I examined them. Without looking at my original notes, this sounds like an accurate, exact report of what Dr. Allen said to me. My original report was written in longhand and this is a photostatic copy. This report embodies what I made of notes.

In response to the question "Is it an exact copy of your notes that you made at Dr. Allen's office?", the witness replied "Well, the facts would be the same", and then continued in cross-examination to testify substantially as follows:

I naturally wrote as fast as I could. There may have been some conjunctions or something like that that I have omitted. I wrote as fast as I could while he was talking. I put down what he said in my notes, but I could not do it word for word, but I would have to have my notes here to tell whether I did or not. I have no recollection of the comparison between the report and my notes. It is two years since I have seen the original notes. My memory is clear about what Dr. Allen said only after refreshing my recollection from the report. I am sure that I saw Dr. Allen between January and May of 1932 because that was the time that I investigated the case. My only recollection of what Dr. Allen told me is what I get from reading this report. I could not remember what he said to me at the time. I realize that Mr. Beebe died in November of 1932. I

guess I have my dates mixed up. I meant that I saw Dr. Allen in 1934, not 1932.

I made the original report with reference to the preparation of the case for the Government in Boston.

Then the witness testified under further cross-examination as follows:

"*Q.* Now, I want to ask you this: You were conscious of what Dr. Allen had said to you all the time and you saw his affidavit, did you not, heard it read and examined it and were furnished a copy of it. Did it occur to you that in any of these conversations that you have had with Mr. Meyer or with counsel for the government to state that there was any part of that affidavit that was not accurate, when he spoke about the health of Mr. Beebe? *A.* Well, I called attention to my chief in the office. . . .

Q. You have been sitting here during the trial and heard Dr. Allen testify? *A.* Yes.

Q. Did you mention this report to Mr. Zimmerman? *A.* I think I did.

Q. When? *A.* I am not so clear about that. It seems to me I first mentioned it a couple of weeks ago, that I mentioned to either Mr. Zimmerman or Mr. Carr about this.

Q. You didn't after Dr. Allen had testified, did you? *A.* I didn't; no, I didn't.

Q. Why not? *A.* Well, I had nothing to do with the carrying on of the case.

Q. Haven't anything to do with the carrying on of the case; aren't you especially interested in the case as representing the estate department of the revenue departmnt? *A.* Well, I did ask him why he didn't cross-examine him.

Q. Why, he didn't cross-examine him; that's all you asked him? *A.* Yes."

The witness then testified under further cross-examination substantially as follows:

I do not remember whether Mr. Zimmerman and I discussed this report or not. We talked about it this morning. I do not think I

talked about it to Mr. Zimmerman prior to this morning. I cannot remember that Dr. Allen told me about Mr. Beebe's coming to him and asking him when Mr. Pierson Beebe became incompetent whether he was likely to go the same way. I cannot say whether he said that was the only occasion. I cannot remember anything beyond what is stated in the report. I learned of the operation from Dr. Allen. I do not remember that Dr. Allen told me the time that he told Mr. Beebe that an operation would be needed. I knew at the time that it was important to ascertain when Mr. Beebe knew that an operation would be necessary, and I probably did ask him that question. If I had that answer, it would appear in the report.

At this point it was agreed that, with the elimination of certain passages, the affidavit of Dr. LEONARD C. JONES might be admitted in evidence. With these eliminations, the affidavit was then read into the record as follows by counsel for the plaintiffs:

"I am a graduate of Harvard Medical School of the class of 1890. In 1911 I took up my residence in Falmouth and since then have practiced medicine in that town. About 1920 I became acquainted with Frank Huntington Beebe, of said Falmouth, and with his brother E. Pierson Beebe. From that time until their deaths (which occurred on November 20, 1932 and August 8, 1926, respectively) I acted as their physician whenever they were in Falmouth.

"So far as I know Frank Huntington Beebe never had any illness of a serious nature until the winter of 1924. He returned from abroad late in the summer of 1923 and soon after his return asked me to see him. His condition seemed excellent, except that he complained of a slight irritation of the bladder. I prescribed some simple remedy (the nature of which I have now forgotten) but it proved successful, and I had no occasion to call on Mr. Beebe again that summer.

"I heard that he had had a prostate gland operation in the winter of 1924 and saw him early the following summer. His condition at that time was excellent, and from then until shortly before he died it remained so. At no time during that period

was there any expectation on my part, nor so far as I know on any one's part that his death was to be expected before the lapse of many years. During my long acquaintance with him there was never any suggestion made by Mr. Frank Huntington Beebe to me which indicated that he contemplated an early demise.

"E. Pierson Beebe spent the summers of 1923, 1924 and 1925 at Falmouth, and I was occasionally called to treat him for minor ailments. He was quite an old man, but his physical condition was good during those years, considering his age, and at no time during that period was there any expectation on my part,, nor so far as I know on any one's part, that his death was imminent or to be expected before the lapse of several years. I attended him at his last illness in the early summer of 1926."

Upon agreement counsel for the defendant then read from a copy of the report of Internal Revenue Agent Madore, dated July 6, 1934, as follows:

"Dr. Lombard C. Jones, Falmouth, Massachusetts.

"Dr. Jones said that in the twenty years he had known the decedent he had not been called in more than two or three times previous to his last illness in 1932. That on those occasions the decedent had nothing of consequence, possibly a slight cold. He said that the decedent had a nervous temperament which made him worry about any little thing he had, but that he did not treat him for nervousness. He did not recall anything special about the decedent's condition in 1924, 1925 or 1926. The decedent made no statements to him in 1924, 1925, 1926, that would indicate he contemplated death and he does not think decedent contemplated death during that period. He said decedent was fairly normal during those years and that until 1932 he did not see any change in decedent in twenty years. Dr. Jones said that he was called in for the decedent's last illness in the latter part of the summer of 1932 while the decedent was at his summer home in Falmouth. He described the decedent's condition at that time as heart trouble, that he was very weak, could not sleep well and generally showed that he was suffering

from arteriosclerosis. During that last summer he discovered that the decedent had a small hernia and he got a truss for it, but he does not believe that the decedent wore it. Had not noticed that the decedent had difficulty in walking and did not know he had a weak back as described by Dr. Allen."

The witness JOHN B. MADORE was then recalled and testified substantially as follows: I could not find my notes. I found the longhand report.

The witness SEABURY W. ALLEN was then recalled by the plaintiffs and testified substantially as follows:

Mr. Madore was at my office perhaps ten minutes. He asked me a few questions and wrote down my name and Mr. Beebe's name. He did not write the answers to the questions, according to my memory.

Dr. WILLIAM C. QUINBY was recalled as a witness by the defendant and testified in *direct examination* substantially as follows:

I know that the Boston City Hospital has had an unfavorable mortality rate on prostate operations. I am not familiar with the results and do not know that a report has been made. I think the mortality is probably as much as twenty-five percent or thereabouts.

Upon *cross-examination* by counsel for the plaintiffs the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

Many of the patients at the Boston City Hospital are in very poor condition before they reach the hospital. The mortality of operations for the prostate all over the world as of 1922, compiled on reports gathered between the years 1912 and 1922, shows a world mortality of 6.3 percent in 7565 cases. A city hospital such as the Boston City Hospital would have cases where the patient would be brought in where there had to be an immediate operation, and, under those circumstances, the mortality is likely to be increased.

[At this point it was stipulated by counsel that in February, 1923, the value of Frank H. Beebe's own property was nearly three million dollars—in the neighborhood of $2,857,837.

It was also stipulated by counsel that neither the Registry of Pro-

bate nor the Registry of Deeds received either the instrument of February 13, 1924, which was executed by Mr. Beebe, or the confirmation of that instrument dated October 22, 1926 (copies of which instruments are in evidence as Exhibit 7), until October 23, 1926, but that they were received by the Registry of Probate on January 3, 1931, and by the Registry of Deeds on October 23, 1926.]

The foregoing, with the exhibits referred to above, is all of the material evidence in the case.

At the trial the plaintiffs filed requests for rulings of law as appears below. The court allowed the same "in so far as they are consistent with this opinion" (the opinion of the court), and denied them "in so far as they are inconsistent".

At the trial the court noted the exceptions of the plaintiffs to the refusal of the court to grant each of the following of the plaintiffs' requests for rulings of law:

"1. A transfer is not in contemplation of death within the meaning of the Revenue Acts applicable to estate tax on the estate of Frank H. Beebe unless the thought of death, other than the general expectation of death which all entertain, is the impelling cause of the transfer.

2. A transfer is not in contemplation of death within the meaning of said Revenue Acts if it is a gift *inter vivos* springing from a motive different from such thought of death."

"7. The instrument dated February 13, 1924, copy of which is in evidence as part of Exhibit 7, was not executed by Frank H. Beebe in contemplation of his death.

8. An attempted transfer of property which one expects or hopes to receive from the estate of a person who is still living upon the death of that person is inoperative in the absence of actual consideration or a deed containing a warranty or covenant of some kind or language having the effect of a warranty or covenant.

9. No trust or valid transfer of property was created by the execution and delivery of the instrument executed by Frank H. Beebe on February 13, 1924, copy of which is part of Exhibit 7.

10. A valid trust of the property to which Frank H. Beebe

became entitled by virtue of the residuary clause of the will of E. Pierson Beebe was created by virtue of the instrument of confirmation executed by Frank H. Beebe on October 22, 1926.

11. The gifts made by the instrument executed October 22, 1926, were completely vested beyond recall before the passage of the Joint Resolution of March 3, 1931.

12. Under the trust created by instrument executed October 22, 1926, interests vested immediately in the trust estate created thereby, not only in Frank H. Beebe, but in various other beneficiaries of said trust, and said interests vested more than six years before the death of Frank H. Beebe.

13. This trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of his death.

13A. This trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe, more than six years before his death.

13B. This trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death.

14. The Joint Resolution of March 3, 1931, amending the Revenue Act of 1926, and any re-enactment thereof, should be construed not to include transfers made prior to March 3, 1931.

15. If said Joint Resolution of March 3, 1931, or any re-enactment thereof, is construed to include any of the trusts involved in this case, it is to that extent invalid and void as in conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to any of said transfers, would deprive the estate of Frank H. Beebe and the executors thereof of property without due process of law."

"20. In computing the federal estate tax on the estate of Frank H. Beebe, none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as part of the gross estate.

21. Although the determination of a deficiency by the Commissioner of Internal Revenue is *prima facie* correct, the pre-

sumption is open to be overcome by adequate testimony, and the burden upon the taxpayer seeking to recover the amount paid as such a deficiency is only the ordinary burden of sustaining his case by a fair preponderance of the credible evidence. If, in such a case, the plaintiff establishes his case by a fair preponderance of the credible evidence introduced at the trial, the fact that the Commissioner has made a determination against the taxpayer is entitled to no weight.

22. Section 403 (a) of the Revenue Act of 1921, which was in effect on February 13, 1924, provided that in determining the value of the net estate for the purpose of the estate tax there shall be deducted:

> '(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance or which can be identified as having been acquired in exchange for property so received.'

A similar provision appears in all subsequent Revenue Acts.

23. Judgment should be ordered for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

24. The plaintiffs are entitled to costs."

At the trial the plaintiffs filed requests for findings of fact. The court refused to grant such requests except in so far as the findings were made part of the opinion. At the trial the court noted the plaintiffs' exceptions to the refusal of the court to grant each of the following of the plaintiffs' requests for findings of fact:

"1. The allegations of the declaration, in so far as admitted by the defendant's amended answer, are true."

"7. Frank H. Beebe was also greatly interested in music, and while in Boston regularly attended the opera, the Symphony concerts and other concerts, including the Statler concerts Wednesday mornings. He gave musical concerts at his own

home and had music students frequently at his house. He aided many of them financially and subscribed liberally to the Opera, to the Symphony, and to the Conservatory of Music, of which he became a Trustee.

8. Frank H. Beebe was also very fond of travel, and nearly every year up to about 1930 he went abroad for several weeks and travelled extensively there."

"11. After Mr. Brown became well established in the office, Frank H. Beebe was very irregular in his attendance there. He was often away for weeks at a time, and seldom, if ever, spent a long working day at the office. Even when he came to the office, he spent most of the time attending to his own personal affairs rather than the business of the office, and often, even when he was in Boston, days and weeks would go by without Mr. Beebe's discussing anything important with Mr. Brown. Mr. Brown attended to the routine management of the office; and all of the major decisions in regard to the handling of the trusts, such as changes of investments, were made in conjunction with Mr. Welch. All that Mr. Beebe did was to sign checks occasionally or to sign some letter prepared by Mr. Brown, and to consult occasionally with Mr. Welch or Mr. Brown; and occasionally, but not regularly, he went to the safe deposit box to cut coupons. Although Mr. Beebe kept track of things in a general way, he frequently told Mr. Brown that he did not want to hear anything about business."

"13. Many years before, Frank H. Beebe and other members of his family had established a trust for his mother's sister. Some time in 1922, Mr. Welch had suggested to Frank H. Beebe and other beneficiaries of the estate of James M. Beebe the desirability of forming a trust of the real estate owned by that estate. This matter was under advisement for several years. In the course of the discussions about this, Frank H. Beebe stated to E. Sohier Welch that he had made gifts from time to time to various friends and members of his family, that these gifts were rather irregular, and he was subjected to frequent requests for money from the recipients of his bounty. He

stated that he wished to make some more regular arrangements for persons to whom he wished to make gifts, and that he himself wanted to be relieved from the details of looking out for such payments. The matter was discussed at length over a period of several months by Mr. Welch and Mr. Beebe, and the two agreed that the purposes which Mr. Beebe had in mind could best be served by creating trusts for the persons to whom he wished to make gifts, by the terms of which these persons would receive the income. Mr. Beebe's income taxes were very high at this time, and Mr. Welch advised him that by making these trusts he would make substantial savings in income taxes.

14. During the course of the discussion about these trusts, Mr. Beebe also expressed concern about the additional care which would come to him if he inherited property from his older brother, E. Pierson Beebe. At this time Pierson Beebe had an estate of nearly $7,000,000, and, as Frank H. Beebe knew, by the terms of the will which Pierson had executed, before he became incapacitated, one-half of the residue of his estate was to go to Frank H. Beebe and the other half to a nephew, C. Philip Beebe, wso was incompetent and was under the guardianship of Frank H. Beebe and E. Sohier Welch. The investments in Pierson Beebe's estate were extremely diversified. There were several pieces of real estate and several hundred items of securities,—stocks and bonds of different kinds. Frank H. Beebe expressed a desire to bring about continuity in the management of all the properties with which Messrs. Welch and Brown were concerned. He stated that he assumed that whatever C. Philip Beebe inherited from E. Pierson Beebe would be managed by Mr. Welch as one of his guardians, but the question arose as to how to handle Frank H. Beebe's share. In the course of these discussions, Mr. Beebe also stated that he was concerned with the probability that if he inherited some of Pierson Beebe's property, the importunities upon him would increase, and stated that he wished to have the property tied up in such a way that he could say that he could not touch it.

Accordingly it was decided by Mr. Welch and Mr. Beebe to form a trust of this property."

"24. The instrument executed by Mr. Beebe on February 13, 1924, purported to 'grant, remise, release, assign, transfer and convey unto the said E. Sohier Welch, and the said Sylvester Brown, their heirs and assigns, all the estate, right, title, interest and property, claim and demand whatsoever I, the said Frank Huntington Beebe, now have or may hereafter acquire of, in or to any and all of the estate of my brother, E. Pierson Beebe, which shall pass to me either as a legatee or devisee under his will or shall pass to me under the laws of descent or distribution as one of his heirs-at-law and next-of-kin in case he shall decease intestate.' The only property coming within this description was the property which Frank H. Beebe acquired after the death of E. Pierson Beebe by virtue of the residuary clause of the will of E. Pierson Beebe. This instrument of February 13, 1924, contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid to Mr. Beebe by the grantees or any beneficiary. The trustees named did not then receive any property or execute any instrument accepting the trusts or promising to do so.

25. On August 8, 1926, E. Pierson Beebe died. Frank H. Beebe was abroad; but although immediately notified of his death, did not return until the time he had planned, several weeks later. In October, 1926, after his return, he was advised that the instrument which he had executed in 1924 was ineffective to create a trust of his brother's property. Mr. Beebe stated that he was as anxious as ever to be relieved of the care of this property, and to tie it up so that he could tell persons importuning him that he had no power to touch it. He consequently executed an instrument confirming the trust, but suggested that as it was a family matter and he wished to have the legal right to have a voice in the management of the property, he wished to be added as a trustee himself. He also made it clear that he wished a share of the commissions as trustee of this property. He stated that he did not expect to take an active part in the

management of this trust. Appropriate papers were executed and the property was in 1926 and 1927 turned over to the three trustees, Mr. Welch, Mr. Brown and Mr. Beebe, who administered it in accordance with the terms of the trust.

26. Copies of the instruments relating to this trust, executed on February 13, 1924 and on October 22, 1926, are in evidence as Plaintiffs' Exhibits 7 and 8. Each was recorded in the Registry of Deeds in Suffolk County, Massachusetts, on October 23, 1926, and also with the Registry of Probate of that county in 1930, and the trustees rendered to the Probate Court of that county annual accounts which were approved. The instrument of February 13, 1924, had not been recorded anywhere until October 23, 1926.

27. In 1926 and 1927 E. Sohier Welch, Sylvester Brown and Frank H. Beebe, as trustees, received the property to which Frank H. Beebe became entitled as one of the residuary legatees under the will of E. Pierson Beebe. These three, up to the time of the death of Frank H. Beebe, and Welch and Brown since then, have been holding that property or the reinvestments thereof as trustees and have handled it in accordance with the terms of the two instruments executed by Mr. Beebe on February 13, 1924 and October 22, 1926, of which copies are in evidence as Exhibit 7. They have rendered accounts to the Probate Court of Suffolk County, filed copies of these instruments with the Register of that court, and these accounts from time to time have been allowed."

"30. Until two or three months before his death, with the exceptions hereafter mentioned, Mr. Beebe had enjoyed good health and had continually maintained his interest in his place at Falmouth, in music, and in art; he was always cheerful; and there was no evidence that he was concerned with the thought of death or said anything indicating that he thought that he was going to die soon or entertained any apprehension of death.

31. In the summer of 1922, while he was in London, Mr. Beebe consulted a physician who told him that some time he might have to have an operation to remove his prostate gland.

After Mr. Beebe's return to this country, he continued his life and activities in the same way that he had before. The physician in London had given him a catheter to use if he had trouble, and he had not used it at any time. Mr. Beebe consulted his own physician, Dr. Allen, during the fall of 1923, who found his prostate partially obstructed and prescribed an ordinary simple treatment. The necessity for an operation was not indicated until the last week in February, 1924, when Dr. Allen told him that he should be operated on soon to save a worse condition, and that if this was done, there would be no particular occasion for worry and that the worst would probably be several weeks in the hospital. Dr. Allen did not indicate the possibility of a fatal result, and told Mr. Beebe that the situation would not be serious if the operation was done without delay by a competent physician.

32. On February 24, 1924, Mr. Beebe visited a surgeon, Dr. Quinby, and on the next day Mr. Quinby called on Mr. Beebe. On one of these days Dr. Quinby advised Mr. Beebe to have his prostate removed. Mr. Beebe's trouble at that time was not acute, and as Dr. Quinby said, the operation then was 'a matter of election'.

33. Dr. Quinby told Mr. Beebe that he was an unusually good risk, and told him (as was the fact) that he had participated in part of a series of operations at the Johns Hopkins Hospital at Baltimore in which there had been operations removing prostate glands in over 140 cases without a single death, these patients not being picked, but being all of those who came to the hospital during that time."

"35. At the hospital Mr. Beebe was put to bed to rest, and after five days of that Dr. Quinby found that his condition was entirely satisfactory. During this period and at all times before the operation, Mr. Beebe showed or expressed no apprehension over the result, but continued to make plans for the future, including planting and planning for improvements on the Falmouth estate and the reservation of tickets for concerts.

Dr. Quinby operated on Mr. Beebe, removing his prostate gland, on March 5, 1924."

"40. Plaintiffs' Exhibits 1 and 2 are good photographs of Mr. Beebe taken in his garden at Falmouth in August, 1932. Plaintiffs' Exhibit 11 is a good protograph of Mr. Beebe taken earlier. His appearance at the time he executed the instruments on February 13, 1924, was substantially the same as shown in Exhibit 11."

"42. At no time in 1924 or 1926 did Mr. Beebe have any particular concern about death.

43. At the time of executing the instruments in February, 1924, Frank H. Beebe did not have a particular concern of death giving rise to a definite motive for executing those instruments.

44. The thought of death was not an impelling cause of the making of any of the five trusts mentioned above created by Mr. Beebe.

45. At the time of executing the instrument of October 22, 1926, Frank H. Beebe did not have a particular concern about death giving rise to a definite motive for creating a trust on that date."

"47. The execution of the instrument of February 13, 1924, by Frank H. Beebe sprang from motives other than the thought of death.

48. The trust created by the instrument of October 22, 1926, sprang from motives other than the thought of death."

"51. The impelling causes of executing the instruments purporting to create trusts of property to which he might become entitled or to which he later became entitled from the estate of Pierson Beebe was to prevent the cares of the management of that property from falling entirely upon Frank H. Beebe and to put that property in the hands of trustees so that he could tell importuning friends and relatives that he could not touch it."

"60. The instrument executed by Frank H. Beebe dealing with property from the estate of E. Pierson Beebe, which was

executed by Frank H. Beebe on February 13, 1924, was not executed in contemplation of the death of Frank H. Beebe.

61. The trust which Frank H. Beebe attempted to create by said instrument was not intended to take effect in possession or enjoyment at or after the death of Frank H. Beebe.

62. The trust created by instrument dated October 22, 1926, was not created by Frank H. Beebe in contemplation of his death.

63. The trust created by instrument executed by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after the death of Frank H. Beebe.

64. All interest in and power of control over the corpus of the trust created on October 22, 1926, passed irrevocably from Frank H. Beebe when such corpus was transferred from him to the trustees, notwithstanding the fact that he retained a life interest in the income."

At the trial the plaintiffs filed a motion for judgment in the sum of $553,818.94, with interest thereon at the rate of six percent per annum from May 2, 1935, to the date of judgment. The court denied said motion and, at the trial, noted the plaintiffs' exception to its denial thereof.

At the trial the court handed down an opinion which contained certain findings of fact and conclusions of law. The plaintiffs excepted to certain findings and rulings mentioned hereafter and the court, at the trial, noted the plaintiffs' exception to each of the following:

On page 7 of the opinion, to this finding:

"Whether or not this instrument"—that being the conveyance of February 13, 1924, relating to the E. Pierson Beebe estate—"was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions."

In the conclusions; to the following:

On page 10: ". . . a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift."

On the same page: "It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition."

On page 11 the following sentence: "Such a purpose", that is, to relieve the decedent of the burdens of management, "while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others."

On the same page the sentence: "The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly."

On the same page this sentence: "The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift."

On page 12 of the opinion, this sentence: "Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death."

On the same page this sentence: "That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death."

On page 13 this sentence: "In the present case the dominant motive seems to be the retention of the income for the life of

the settlor, and the incidental setting up of a trust to accomplish this purpose."

On the same page, the following extract from another sentence: ". . . when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death."

On the same page this sentence: "I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator."

On page 14 this sentence: "In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932."

On August 18, 1936, the defendant filed a motion to amend the findings of fact, reading as follows:

"Now comes the defendant by his attorney, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and moves that the court amend its findings of fact, as follows:

"To eliminate from the findings of fact announced by the court the following sentence in the next to the last paragraph of the findings of fact on page 7 of the typewritten opinion, that sentence reading as follows:

His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.

"To substitute for the said sentence eliminated the following

His purposes in establishing the trust itself were (1) to re-

lieve himself of the burdens of management of this legacy, (2) to avoid the importunities of his family and his friends, (3) to relieve his estate from estate taxes, (4) to make testamentary dispositions, (5) to make a transfer in trust in contemplation of death, and (6) to make a transfer in trust to take effect in possession or enjoyment after his death.

The decedent was actuated by a motive or an intent other than to make a present, complete and outright gift.

I find that the purposes above set out bearing the numbers 3 to 6, inclusive, were substantial and controlling motives."

This motion was heard by the court and, after argument, was denied on October 13, 1936.

The court granted written motions extending the time of the plaintiffs for filing a bill of exceptions as follows:

On August 3, 1936, the court granted the plaintiffs' motion to extend the time for filing their bill of exceptions to and including September 7, 1936, and on August 31, 1936, the court granted the plaintiffs' motion to extend the time for filing their bill of exceptions to and including October 7, 1936.

Also, on August 31, 1936, the court allowed the following motion of the plaintiffs:

"Now come the plaintiffs in the above-entitled case and move that the court enter an order in the form annexed hereto extending the case for certain purposes to the September, 1936, Term."

The order referred to is as follows:

"In the above-entitled cause it is hereby ordered that said cause be continued to the September, 1936, Term of this court for the purpose of settling, allowing, signing and filing bills of exceptions of each party and the entry of judgment, such bills of exceptions to be settled, allowed and signed within such time as the court shall hereafter fix."

On October 6, 1936, the court granted the plaintiffs' motion to extend the time for settling and allowing their bill of exceptions to and including November 7, 1936, and on November 4 the court granted a motion extending such time to November 30.

On September 12 the plaintiffs filed a bill of exceptions, and on November 30 the plaintiffs filed amendments to said bill of exceptions.

The plaintiffs, being aggrieved by the refusal of the court to grant their motion for judgment and by each of the foregoing denials of their requests for findings of fact and rulings of law, and the action of the court in making each of those findings of fact and rulings of law set forth above, to which the exceptions of the plaintiffs were noted, bring this bill of exceptions and pray that it be allowed.

E. SOHIER WELCH AND SYLVESTER BROWN,
Executors under the Will of
Frank Huntington Beebe,
by their Attorneys,
JOHN L. HALL,
CLAUDE R. BRANCH,
HENRY HIXON MEYER,
EDWARD C. THAYER,
by CLAUDE R. BRANCH.

11–30–36. Allowed. GEO. C. SWEENEY.

See plaintiffs' bill of exceptions.

G. S. C.

PLAINTIFFS' EXHIBIT 7.

DEED OF TRUST, DATED FEBRUARY 13, 1924 AND CONFIRMATORY DEED, DATED OCTOBER 22, 1926.

Know all Men by these Presents, that I, Frank Huntington Beebe, of Falmouth, in the County of Barnstable and Commonwealth of Massachusetts, in consideration of One Dollar and other good and valuable considerations to me paid by E. Sohier Welch, of Weston, in the County of Middlesex, and Sylvester Brown, of Braintree, in the County of Norfolk, and said Commonwealth, the receipt is hereby acknowledged, do hereby grant, remise, release, assign, transfer and convey unto the said E. Sohier Welch and the said Sylvester Brown, their heirs and assigns, all the estate, right, title, interest, property, claim and demand whatsoever I, the said Frank Huntington Beebe,

now have or may hereafter acquire of, in or to any and all of the estate of my brother, E. Pierson Beebe, which shall pass to me either as a legatee or devisee under his will or shall pass to me under the the laws of descent or distribution as one of his heirs-at-law and next of kin in case he shall decease intestate.

To have and to hold the same, together with all rights, privileges and appurtenances to the same belonging, to the said E. Sohier Welch and the said Sylvester Brown, and their heirs, executors, administrators and assigns, in trust, nevertheless, to hold, manage and invest the same until the decease of the survivor of myself, the said Frank Huntington Beebe, my nephew, George Stanley Fiske, hereinafter named, my niece, Esther Fiske Hammond, hereinafter named, and Gardiner Greene Hammond, George Fiske Hammond, Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond and Mary C. Hammond, children of my said niece, and to pay the net annual income therefrom, in quarter-yearly payments, to me, the said Frank Huntington Beebe, during my lifetime, and from and after my decease to pay the net annual income therefrom, in quarter-yearly payments, as follows: A one-third part thereof to my said nephew, George Stanley Fiske, during his lifetime, and thereafter to and among his issue, if any, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be added ratably to the other shares of income then being paid from said trust estate; a one-third part thereof to my said niece, Esther Fiske Hammond, during her lifetime and thereafter to and among her issue, if any, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be paid to my said nephew, if living, otherwise, to his issue living at the respective dates of payment of income; a one-third part thereof to and among the issue, if any, of my said niece, Esther Fiske Hammond, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be added ratably to the other shares of income then being paid from said trust estate.

Upon the decease of the last survivor of myself, the said Frank

Huntington Beebe, my said nephew, George Stanley Fiske, my said niece, Esther Fiske Hammond, and said Gardiner Greene Hammond, George Fiske Hammond, Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond and Mary C. Hammond, children of my said niece, the principal of said trust estate, as it shall then exist, shall be transferred, paid over and conveyed, free and discharged from all trusts, as follows: A one-third part thereof to the then living issue, if any, of my said nephew, George Stanley Fiske, such issue to take by right of representation, and a two-thirds part thereof to and among the then surviving issue, if any, of my said niece, Esther Fiske Hammond, such issue to take by right of representation. In case there shall not be any issue of my said nephew living at the date of the termination of said trust, the share such issue would have taken, if then living, shall be transferred, paid over and conveyed, free and discharged from all trusts, to the then living issue, if any, of my said niece, such issue to take by right of representation. In case there shall not be any issue of my said niece living at the date of the termination of said trust, the share such issue would have taken, if then living, shall be transferred, paid over and conveyed, free and discharged from all trusts, to the then living issue, if any, of my said nephew, such issue to take by right of representation. In case, at the date of the termination of said trust, there shall not be any issue either of my said nephew or of my said niece then living, the then Trustees hereunder shall pay over, transfer and convey, free and discharged from all trusts, the principal of said trust property then held in trust, to and among those persons who would have been entitled to receive the same according to the laws of the Commonwealth of Massachusetts, then in force, if it had been the absolute property of myself, the said Frank Huntington Beebe, and I had deceased intestate, a resident of said Commonwealth, upon the date of the termination of this trust.

The number of the Trustees hereunder shall be kept up to two, and whenever any vacancy shall occur, I direct the surviving or remaining Trustee, for the time being whether original or substituted, with my assent in writing during my lifetime, and thereafter with the assent in writing of the majority of the persons having the beneficial interest in said trust estate then owned by adults, to appoint

in writing some person whose vocation is the management of trust estates to act as co-Trustee with the surviving or remaining Trustee, which new Trustee shall have all the rights and perform all the duties of the Trustee ceasing to act, and the said trust property shall vest in such new Trustee in like manner as it had vested or would have vested in the Trustee in whose place he is substituted and such new Trustee shall have the same powers, rights and duties and the same title to the trust estate as if he had been originally appointed. In case a vacancy shall exist in the office of Trustee hereunder for a consecutive period of three months, the judge for the time being of the Probate Court for said Barnstable County shall, upon the written request of such surviving or remaining Trustee or of any beneficiary of said trust, appoint some person whose vocation is the management of trust estates to act as co-Trustee with the surviving or remaining Trustee, and any Trustee so appointed shall have the same powers, duties and estate as if appointed as above provided by the surviving or remaining Trustee with the assent of a beneficiary or beneficiaries, and in default of such appointment, a co-Trustee to act with the surviving or remaining Trustee shall be appointed in the manner provided by law, and any Trustee so appointed shall be exempt from giving any surety or sureties upon his official bond as such Trustee.

Each of the Trustees at any time acting hereunder shall be liable for his own receipts, payments and wilful defaults and for nothing else, and one shall not be liable for the other, nor for errors of judgment.

During the continuance of a vacancy the surviving or remaining Trustee shall have every power herein given to the two Trustees, but intending that there always shall be two Trustees acting under this instrument.

The decision of the Trustees hereunder as to any questions arising between capital and income shall be final and binding on all persons then or thereafter interested.

The income herein given shall not be alienable by any beneficiary, either by assignment or by any other method, and the said income shall not be subject to be taken by his or her creditors by any process whatever.

The Trustees for the time being under this instrument are authorized and empowered to sell at public or private sale, mortgage, pledge, or lease any portion or the whole of the estate, real or personal, which they may hold under the trusts hereby created, and to execute and deliver good and sufficient deeds and other instruments to convey and transfer the same. And whenever it shall become necessary to make final distribution of any property held in trust under this instrument, the Trustees for the time being shall have like authority for the purpose of such distribution to sell and convert into money the whole or any portion of such property whether real or personal.

Upon all sales by the Trustees under this instrument the purchasers shall not be bound to see to the application of the purchase money.

In case the surviving or remaining Trustee at any time hereunder shall appoint a new Trustee, the instrument in writing making such appointment shall certify that the vocation of the new Trustee is the management of trust estates, and such instrument shall be conclusive evidence of the matters therein stated, binding all persons then or thereafter interested, other than as beneficiaries of the trust.

The word "Trustees" wherever used in this instrument shall be construed and taken to mean the Trustees or Trustee for the time being whether original or substituted.

In witness whereof, I, the said Frank Huntington Beebe, have hereto set my hand and seal this Thirteenth day of February, A. D. Nineteen Hundred and twenty-four.

FRANK H. BEEBE [SEAL]

In presence of Harry F. Reiser.

Commonwealth of Massachusetts.

Suffolk, ss. Boston, February 13, 1924.

Then personally appeared the above-mentioned Frank Huntington Beebe and acknowledged the foregoing instrument, by him subscribed, to be his free act and deed. Before me,

HARRY F. REISER,

[SEAL] Notary Public.

Know all Men by these Presents That I, Frank Huntington Beebe, of Falmouth in the County of Barnstable and Commonwealth of Massachusetts, being unmarried, the grantor named in the foregoing deed, hereby ratify and confirm the same, and, for consideration paid, hereby grant unto E. Sohier Welch of Weston in the County of Middlesex and said Commonwealth, and Sylvester Brown of Braintree in the County of Norfolk and said Commonwealth, all the estate, right, title, interest, property, claim and demands whatsoever that I have acquired in or to any and all of the estate of my brother, E. Pierson Beebe, late of said Falmouth, deceased.

To have and to hold the same, together with all rights, privileges and appurtenances to the same belonging, to the said E. Sohier Welch and the said Sylvester Brown and their heirs, executors, administrators and assigns, in trust nevertheless for all the purposes and with all of the powers set forth in the foregoing instrument.

In witness whereof I, the said Frank Huntington Beebe, have hereunto set my hand and seal this Twenty-second day of October, A. D. 1926. FRANK H. BEEBE [SEAL]

Commonwealth of Massachusetts.

Suffolk, ss. October 22, 1926.

Then personally appeared the above named Frank Huntington Beebe and acknowledged the foregoing instrument to be his free act and deed, before me, ELEANOR S. MUIR

[SEAL] Notary Public

From the aforementioned judgment, the plaintiffs claimed an appeal to the United States Circuit Court of Appeals on the Eighth day of February, A. D. 1937, which was allowed by the court on the same day.

PLAINTIFFS' ASSIGNMENT OF ERRORS.

[Filed February 8, 1937.]

The plaintiffs, E. Sohier Welch and Sylvester Brown, executors u/w Frank Huntington Beebe, respectfully specify the following assignments of error with respect to the proceedings had in the above-entitled cause and the judgment entered therein on February 8, 1937:

1. That the court erred in denying the plaintiffs' motion for judgment in the sum of $553,818.94 and interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

2. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "A transfer is not in contemplation of death within the meaning of the Revenue Acts applicable to estate tax on the estate of Frank H. Beebe unless the thought of death, other than the general expectation of death which all entertain, is the impelling cause of the transfer."

3. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "A transfer is not in contemplation of death within the meaning of said Revenue Acts if it is a gift *inter vivos* springing from a motive different from such thought of death."

4. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "The instrument dated February 13, 1924, copy of which is in evidence as part of Exhibit 7, was not executed by Frank H. Beebe in contemplation of his death."

5. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "An attempted transfer of property which one expects or hopes to receive from the estate of a person who is still living upon the death of that person is inoperative in the absence of actual consideration or a deed containing a warranty or covenant of some kind or language having the effect of a warranty or covenant."

6. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "No trust or valid transfer of property was created by the execution and delivery of the instrument executed by Frank H. Beebe on February 13, 1924, copy of which is part of Exhibit 7."

7. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"A valid trust of the property to which Frank H. Beebe became entitled by virtue of the residuary clause of the will of E. Pierson Beebe was created by virtue of the instrument of confirmation executed by Frank H. Beebe on October 22, 1926."

8. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"The gifts made by the instrument executed October 22, 1926, were completely vested beyond recall before the passage of the Joint Resolution of March 3, 1931."

9. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Under the trust created by instrument executed October 22, 1926, interests vested immediately in the trust estate created thereby, not only in Frank H. Beebe, but in various other beneficiaries of said trust, and said interests vested more than six years before the death of Frank H. Beebe."

10. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of his death."

11. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe, more than six years before his death."

12. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death."

13. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"The Joint Resolution of March 3, 1931, amending the Revenue Act of 1926, and any re-enactment thereof, should be construed not to include transfers made prior to March 3, 1931."

14. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"If said Joint Resolution of March 3, 1931, or any re-enactment thereof, is construed to include any of the trusts involved in this case, it is to that extent invalid and void as in conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to any of said transfers, would deprive the estate of Frank H. Beebe and the executors thereof of property without due process of law."

15. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"In computing the federal estate tax on the estate of Frank H. Beebe, none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as part of the gross estate."

16. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Although the determination of a deficiency by the Commissioner of Internal Revenue is *prima facie* correct, the presumption is open to be overcome by adequate testimony, and the burden upon the taxpayer seeking to recover the amount paid as such a deficiency is only the ordinary burden of sustaining his case by a fair preponderance of the credible evidence. If, in such a case, the plaintiff establishes his case by a fair preponderance of the credible evidence introduced at the trial, the fact that the Commissioner has made a determination against the taxpayer is entitled to no weight."

17. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Section 403 (a) of the Revenue Act of 1921, which was in effect on February 13, 1924, provided that in determining the value of the net estate for the purpose of the estate tax there shall be deducted:

'(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance or which can be identified as having been acquired in exchange for property so received.'

A similar provision appears in all subsequent Revenue Acts."

18. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Judgment should be ordered for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment."

19. That the court erred in ruling in its opinion:

"Whether or not this instrument [that being the conveyance of February 13, 1924, relating to the E. Pierson Beebe estate] was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe, the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions."

20. That the court erred in ruling in its opinion:

". . . a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift."

21. That the court erred in ruling in its opinion:

"It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition."

22. That the court erred in ruling in its opinion:

"Such a purpose [that is, to relieve the decedent of the burdens of management] while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others."

23. That the court erred in ruling in its opinion:

"The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly."

24. That the court erred in ruling in its opinion:

"The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift."

25. That the court erred in ruling in its opinion:

"Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death."

26. That the court erred in ruling in its opinion:

"That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death."

27. That the court erred in ruling in its opinion:

"In the present case the dominant motive seems to be the retention of the income for the life of the settlor, and the incidental setting up of a trust to accomplish this purpose."

28. That the court erred in ruling in its opinion:

". . . when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death."

29. That the court erred in ruling in its opinion:

"I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator."

30. That the court erred in ruling in its opinion:

"In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932."

Wherefore the plaintiffs, appellants, pray that the judgment of said District Court be reversed, and that the cause be remanded, and that the District Court be directed to enter judgment for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

By their Attorneys,

JOHN L. HALL, Jr.,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

On the eighth day of February, A. D. 1937, the sum of two hundred fifty dollars ($250) was deposited in lieu of bond on appeal by the plaintiffs.

STIPULATION FOR TRANSMISSION OF EXHIBITS.

[Filed February 8, 1937.]

It is hereby stipulated and agreed by and between the parties in the above-entitled cause that the several exhibits introduced in evidence, designated as 1 through 14 inclusive, and A through I inclusive, being the exhibits referred to in the plaintiffs' bill of exceptions allowed in said cause, need not be reproduced in the printed record (with the exception of exhibit numbered 7), but may be transmitted by the clerk of the United States District Court for the District of Massachusetts to the United States Circuit Court of Appeals for the First Circuit as original exhibits as part of the record in said case.

E. SOHIER WELCH AND SYLVESTER BROWN,
Executors of the Will of F. Huntington Beebe,
by their Attorneys,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

A citation on appeal was issued on February 8, 1937, being made returnable in the United States Circuit Court of Appeals on March 10, 1937. Service of said citation was duly acknowledged on behalf of the defendant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States, for the District of Massachusetts, do hereby certify that the foregoing are the transcript of the record on the appeal of the plaintiffs, includ-

ing true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 6469, LAW DOCKET.

E. SOHIER WELCH AND SYLVESTER BROWN, EXECUTORS OF THE WILL OF FRANK H. BEEBE, PLAINTIFFS,

v.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this seventeenth day of March, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, March 18, 1937, is here omitted. A. I. CHARRON, *Clerk.*]

On February 27, 1937, the following stipulation was filed and approved:

The parties in the above cause have stipulated that all but one of the exhibits in the case may be transmitted to the court and need not be reproduced in the record. It is felt that none of the other exhibits are of sufficient importance so that reprinting them would be desirable.

It is understood that if either counsel desires to refer to any of these exhibits, he will reproduce such exhibits, or parts thereof in his brief.

CLAUDE R. BRANCH,
Attorney for Appellants.
FRANCIS J. W. FORD,
United States Attorney.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,
Attorney for Appellee.

On April 23, 1937, this cause came on to be heard and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on the first day of June, A. D. 1937, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3235. October Term, 1936

E. SOHIER WELCH ET AL., EXECUTORS, PLAINTIFFS, APPELLANTS,

v.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE

Appeal from the District Court of the United States for the District of Massachusetts

Before WILSON, MORTON, and MORRIS, JJ.

Opinion of the Court

June 1, 1937

WILSON, *J.* This is an appeal from a judgment of the District Court of Massachusetts in an action by the executors of the will of Frank H. Beebe to recover federal estate taxes to the amount of $363,818.94 paid to the defendant as former acting Collector of Internal Revenue.

The issues arise out of the construction of a trust instrument executed by the decedent in 1924 and affirmed in 1926. It was contended by the Government and sustained by the Commissioner that the transfer and trust in question was entered into in contemplation of death, was testamentary in character, and was intended to take effect in possession and enjoyment at or after the death of the decedent.

The case before the District Court was tried without a jury, a jury being waived. The plaintiffs requested certain special findings of fact and rulings of law during the course of the trial.

Owing to language of the sections of the statute, 700 R. S., authorizing the trial of a law action without the intervention of a jury according to Sec. 649 R. S. and its construction by the courts, an appellate court cannot have recourse to the opinion of the trial court for findings of fact, and to general conclusions of law to supplement any rulings of law by the court at the trial. A general finding in an opinion has the effect of a jury verdict and an exception thereto does not bring up the evidence. Fleischmann Construction Co. v. United States, 270 U. S. 349; Arthur C. Harvey Co. v. Malley, 288 U. S. 415; United States v. Smith, 39 Fed. (2d) 851; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121.

In the instant case, however, the District Court in its opinion under a heading, "Findings of Fact", made certain findings of fact and refused the plaintiffs' request for special findings, except as the findings are made a part of the opinion. While making special findings of fact a part of the opinion may be a questionable practice (see United States v. Esnault-Pelterie, 299 U. S. 201, 206; Crocker v. United States, 240 U. S. 74, 78; United States v. Wells, 283 U. S. 102, 120), there appear to be no issues of consequence between the parties as to the facts set forth under the "Findings of Fact" in the opinion, which are substantially as follows:

On April 8, 1919, Frank H. Beebe and E. Sohier Welch were appointed guardians of the person and estate of E. Pierson Beebe, a brother of the decedent, and continued as such until his death on August 8, 1926. At the time of the appointment of guardians the estate of E. Pierson Beebe was worth between six and seven million dollars.

As a co-guardian of E. Pierson Beebe, the decedent had the custody of a will which had been drawn by E. Pierson Beebe prior to his having been declared incompetent. Under this will the decedent was to receive one-half of the E. Pierson Beebe estate.

Upon assuming the co-guardianship of the estate of E. Pierson Beebe, and the co-trusteeship of the estate of the decedent's father, James M. Beebe, the decedent retained the old offices and clerks of E. Pierson Beebe at No. 6 Beacon Street, Boston. At first he became active in the management of the two trusts, frequently consulting Welch with regard to management and investment. The decedent was enjoying excellent health and was a man of wealth in his own right. Up to this time his interests had not been those of a business man. He loved art, music, flowers and pictures; was a

regular patron of the opera and concerts; spent much of his time in the woods among the trees and flowers, and anually planned the flower garden for his huge summer estate at Falmouth. He was not interested in the business world and many times expressed a distaste for it.

After a short time he became dissatisfied with the burdens he had assumed, and in April of 1921, desiring to be relieved of them, and at the suggestion of the plaintiff Welch, secured the services of Sylvester Brown, who became the office manager of the decedent. Brown's activities were principally in connection with the estate of James M. Beebe, and the co-guardianship of the estate of E. Pierson Beebe. Gradually he took over nearly all of the decedent's work as co-trustee and co-guardian.

The decedent was fond of travel. In the summer of 1923, while visiting in England, he had some bladder trouble, consulted a physician, and was catheterized by him. During the last week of February 1924, the decedent consulted his family physician, told him of his experience in London, and of the fact that the English physician had advised him that an operation would be necessary. He was referred by his physician to a specialist. After consultation with the specialist, and about February 29, 1924, he entered a hospital for an operation, and after a period of pre-operative rest, a prostatectomy was performed on March 5th. At that time the decedent was nearing his seventy-first birthday. A short time later a secondary operation was performed. After a normal convalescence, the decedent was discharged from the hospital on April 15, 1924, and, after regaining his strength, continued in good health until shortly before his death on November 29, 1932. Death was due to myocarditis and arteriosclerosis, which had their inception about two months before his death.

Prior to the first of January 1924, the decedent had made modest financial contributions to relatives and persons close to him. Sometime between the 1st and the 15th of January the decedent first discussed with E. Sohier Welch the possibility of creating certain trusts in order that he might be relieved of the importunities of these relatives and friends; and in order that the beneficiaries of his generosity would receive regular payments from the trust rather than the hit or miss gifts that he had previously made to them.

Later the decedent executed four trusts which are referred to as trusts A, B, C, and D. On the same day he also attempted to create a fifth trust, which will hereinafter be referred to as the Frank H. Beebe trust, and which will be separately discussed.

Trusts A, B, C, and D are not concerned in this case, as they were held by the District Court not to have been made in contemplation of death.

On February 13, 1924, the same date on which trusts A, B, C, and D were carved out of his own estate, the decedent attempted to create a fifth trust, previously referred to as the Frank H. Beebe trust. This trust fund was to be derived from a legacy contained

in the will of E. Pierson Beebe, who was then living, but then under guardianship as an incompetent. Under the will made before he was declared insane he had left about one-half of his estate to the decedent, who attempted to create a trust to include the expectant legacies, reserving to himself the income for life. After his death the income was to be divided one-third to a nephew, George Stanley Fiske, during his lifetime, and thereafter to his issue; one-third to his niece, Esther Fiske Hammond, during her lifetime, and thereafter to her issue; and one-third part to the issue of Esther Fiske Hammond, and on default of any such issue the income was to be added ratably among the other beneficiaries.

He made further provision on the death of these beneficiaries. This instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the grantees or the beneficiaries to the decedent. Whether or not this instrument was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe, acting on the advice of an attorney, a confirmation and ratification of this instrument was made, the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions, as to the disposal of the corpus.

At the time this was done the decedent caused the number of trustees to be changed from two, as written in the original instrument, to three, and caused himself to be elected one of the trustees. Among the findings of fact by the District Court is the following: *His purposes in having himself appointed a trustee were (1) to have the name of Beebe connected with the trust, and (2) because he wanted part of the commissions. His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.* (Italics supplied.) All of the beneficiaries named in it were either those, or their issue, who on his death would become his heirs.

After the opinion of the District Court was rendered, the defendant by his attorney, Francis J. W. Ford, United States Attorney for the District of Massachusetts, moved that the court amend its findings of fact as follows:

"To eliminate from the findings of fact announced by the court the following sentence in the text to the last paragraph of the findings of fact on page 7 of the typewritten opinion, that sentence reading as follows:

"'His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.'

"To substitute for the said sentence eliminated the following: 'His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, (2) to avoid the im-

portunities of his family and his friends, (3) to relieve his estate from estate taxes, (4) to make testamentary dispositions, (5) to make a transfer in trust in contemplation of death, and (6) to make a transfer in trust to take effect in possession or enjoyment after his death.

"'The decedent was actuated by a motive or an intent other than to make a present, complete, and outright gift.

"'I find that the purposes above set out bearing the numbers 3 to 6, inclusive, were substantial and controlling motives.'"

This motion was heard by the court, and after argument was denied on October 13, 1936.

Notwithstanding the findings of fact and the refusal to amend the findings, the District Court ruled that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator.

During the course of the trial, the plaintiffs made the following requests for rulings of law, based on the court's findings of fact, which were denied by the District Court, and which must be held to be inconsistent with the conclusions of the court in its opinion:

(1) The instrument dated February 13, 1924, a copy of which is in evidence, was not executed by Frank H. Beebe in contemplation of death.

(2) The trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of death.

(3) The trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death.

(4) The trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe more than 6 years before his death.

(5) In computing the Federal estate tax on the estate of Frank H. Beebe none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as a part of the gross estate.

(6) At the trial the plaintiffs filed a motion for judgment in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to date of judgment, which motion was denied by the District Court and exceptions were duly noted by the plaintiffs at the trial to the denial thereof.

Certain exceptions were taken by the plaintiffs to portions of the opinion, but in a jury waived case these cannot avail the plaintiffs.

Without entering further into the question of what assignments of error are open to the plaintiffs, Fleischmann Construction Co. v. United States, supra; Wilson v. Merchants' Loan & Trust Co., supra; Arthur C. Harvey Co. v. Malley, supra; United States v. Smith, supra, we think the facts found in the opinion under the heading "Findings of Fact" were intended by the District Court as special findings of fact, from which the rights of the parties under a con-

struction of the trust instrument would follow as a matter of law; and his denial of the plaintiffs' requests for ruling of law in so far as they are inconsistent with his opinion, under their assignments of error, raise the following issues of law for the consideration of this court:

(1) Whether the value of certain property which came from the estate of his brother, E. Pierson Beebe, which was included in the trust created by Frank H. Beebe during his lifetime and known as the "Beebe Trust" should be included in the gross estate of the decedent for purposes of assessing the federal estate tax.

(2) Whether the transfer made by the trust instrument was made by Frank H. Beebe in contemplation of death, and was intended to take effect in possession or enjoyment after the death of the testator.

(3) Whether, regardless of the intention of the creator, Sec. 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Sec. 803 of the Revenue Act of 1932, requires the trust property should be included in the gross estate of the testator, since under the terms of the trust the creator received the entire income of the trust during his lifetime and disposed of the principal of the trust estate.

(4) Whether there was error in denying the plaintiffs' motion for judgment at the close of the trial.

The first two assignments of error may be considered together and raise the issue whether a trust created to relieve the creator of the demands of his relatives and friends, and to dispose of the estate received from his brother after reserving to himself the entire income thereof for life, as a matter of law, renders the transfer by the trust instrument to have been made in contemplation of death and intended to take effect in possession and enjoyment after the death of the creator and testator.

The decisions of the Supreme Court appear to be contrary to this ruling.

In May v. Heiner, 281 U. S. 238, the decedent and creator of the trust transferred properties to a trustee to pay the net income to her husband for life, after his decease to the decedent herself, and after her decease to her children. The court said, page 243:

"The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

Burnet v. Northern Trust Co., 283 U. S. 782 (affirming 41 Fed. (2d) 732); Morsman, Adm'r., v. Burnet, 283 U. S. 783; McCormick et al., Exrs., v. Burnet, 283 U. S. 784; Reinecke, Collector, v. Northern Trust Co., 278 U. S. 339, are to the same effect.

In United States v. Wells et al., Exrs., 283 U. S. 102, 113-120, there is a full discussion of the meaning of this phrase, "in contemplation of death."

In Helvering v. Helmholz, 296 U. S. 93, by the terms of the trust the value of certain stocks was transferred to trustees to pay the dividends of such stocks to the creator and decedent during her life, the remainder to her appointees by will or to her issue. The Supreme Court held that the property so transferred could not be included in the decedent's gross estate, saying in its opinion, page 98:

"The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. Reinecke v. Northern Trust Co., 278 U. S. 339."

In Poor v. White, 8 Fed. Supp. 995, the settlor conveyed property to trustees under a declaration of trust under the terms of which the trustees were to pay one-half of the net income to her during her lifetime and the remainder to her children until her death, after which the entire trust property was to be divided between her three children.

Judge Brewster of the District Court held that the reservation of a portion of the income to herself during her lifetime did not prevent the transfer from being a completed transfer beyond the reach of the statute, citing May v. Heiner, supra; McCormick et al., Exrs., v. Burnet, supra; Morsman, Adm'r., v. Burnet, Com'r., supra; Burnet, Com'r., v. Northern Trust Co., supra.

The judgment of the District Court was affirmed by this court in 75 Fed. (2d) 235, and by the Supreme Court in 296 U. S. 98.

In Smith et al. v. United States, 16 Fed. Supp. 397, the District Court (Judge Brewster) held that it is well settled that an irrevocable trust in which the donor has reserved the right to enjoy the income is nevertheless a completed transfer.

In the instant case the trust created by Frank H. Beebe was irrevocable. He so understood it. In a letter to a niece he said: "The Messrs. Welch, Brown, and myself are the trustees named in this deed *which is irrevocable* and by its provisions I am only able to use the income from this fund from Uncle Pierson during my lifetime." (Italics supplied.)

It is significant as to the intention of Frank H. Beebe in creating this trust that he was transferring only the legacy which came to him from his brother, that he was a man of large and independent means himself, and that he had no apparent reason for making other than a present, outright, and irrevocable gift.

The case is somewhat complicated by statements in the opinion under the court's "Conclusions" wherein the court held that an examination of the facts in the present case as distinguished from that of Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, indicates that the decedent in this case was actuated by a motive or intent other than to make a present, completed, and outright gift, or that the major motive in creating the trust instrument was to dispose of the estate received from his brother, after having reserved to

himself the entire income from that estate. These may seem like findings of fact which are binding on this court, but we think they are merely conclusions resulting from the court's reasoning from the facts found by the court, but by which reasoning we are not bound.

As the Supreme Court said in United States v. Wells et al., Exrs., at page 120, supra:

"The only difficulty presented by the record is that this statement with respect to the motive of decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings. The findings of fact of the Court of Claims are to be treated like the verdict of a jury. We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference.

"It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this Court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that, in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained."

Nor does the reasoning bind this court by which the District Court arrived at its conclusions, that the creator, having accomplished his purpose of evading the burden of managing his estate, as well as the importunities that he found would inevitably follow the ownership of an estate of over $3,000,000, took one stop more and made provisions in the same instrument for disposing of the entire fund after his death, which the court suggests was done to avoid the estate taxes.

To dispose of one's property after the termination of the trust existed as one of the major motives in all the cases above cited, and yet the court held that it did not prevent a present, completed and irrevocable transfer so far as the creator was concerned.

We think it is clear from the facts found and admitted by the pleadings that it does not follow from the trust instrument in this case that it was made in contemplation of death, nor intended only to take effect in enjoyment or possession after the creator's death, but upon the creation of the trust the right of possession irrevocably passed to the trustees, and the enjoyment of the benefits or income thereof at once enured to the creator, and at his death to certain persons named in the instrument during the continuance of the trust, the absolute title to the corpus thereafter passing to definite persons

defined in the trust instrument. The interpretation of the trust deed is a question of law, in view of the facts found by the court. We, therefore, are of the opinion that a denial of the motion of the plaintiffs for judgment made during the trial and presumable at the close, was an error of law.

While the District Court did not rule on the application of Sec. 302 (c) of the Act of 1926, as amended by the Joint Resolution of 1931, and by the Act of 1932, we think that the title to all the decedent's interest in the estate of his brother had passed out of his hands by his confirmation of the trust deed of 1924 on October 22, 1926, subject to the income for life.

At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. Heiner v. Donnan, 285 U. S. 312; Nichols v. Coolidge et al., Exrs., 274 U. S. 531; Helvering v. Helmholz, supra; Poor v. White, supra.

In the case of Helvering v. Helmholz, supra, page 97, 98, the court said:

"Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. Reinecke v. Northern Trust Co., 278 U. S. 339. If Sec. 302 (d) of the act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. Nichols v. Coolidge, 274 U. S. 531."

While the provision of Sec. 302 (c) of the 1926 Act here involved is not the same as 302 (d) construed in Helvering v. Hemholz, supra, the principle involved is the same. In that case there was no power reserved to the creator alone to alter, amend, or revoke the trust instrument, but there was a completed, irrevocable, present transfer. In each case the Commissioner undertook to include in the gross estate, to be subject to an estate tax, property which had been conveyed away by an irrevocable transfer during the lifetime of the creator of the trust.

The defendant's contention that these statutes can have a retroactive effect where there has been an irrevocable transfer of the decedent's interest during his lifetime, even though he reserves the income of the property so conveyed, cannot prevail in view of the decisions of the Supreme Court above cited, together with Helvering v. St. Louis Union Trust Co., 296 U. S. 39; Becker v. St. Louis

Union Trust Co., 296 U. S. 48, 56, and Helvering v. City Bank Farmers Trust Co., supra. If doubt exists as to the construction of these statutes, it should be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151.

We think the District Court's interpretation of the trust instrument, in the light of the facts found by him and the admitted facts in the pleading, was error, and the motion of the plaintiffs for judgment should have been granted.

The judgment of the District Court is reversed with costs and the case is remanded to that court for further proceedings not inconsistent with this opinion.

On the same day to wit, June 1, 1937, the following judgment was entered:

Judgment

June 1, 1937

This cause came on to be heard April 23, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 1, 1937, here ordered, adjudged, and decreed as follows: The judgment of the District Court is reversed with costs and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 24, 1937, a motion for stay of mandate was filed by appellee and was denied by the court.

Thereafter, to wit, on July 2, 1937, a mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, hereto prefixed, contain and are a true copy of the record and all proceedings to and including August 20, 1937, in the cause in said court numbered and entitled, No. 3235. E. Sohier Welch et al., Executors, Plaintiffs, Appellants, v. Thomas B. Hassett, Individually and as Former Acting Collector, Defendant, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twentieth day of August, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE, 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for hearing immediately following No. 406.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER

v.

E. SOHIER WELCH ET AL., EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas B. Hassett, former Acting Collector of Internal Revenue for the District of Massachusetts, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above entitled cause on June 1, 1937, reversing the decision of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the

Circuit Court of Appeals (R. 119) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1937 (R. 128). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, should be construed to apply to transfers made prior to the dates of passage of the amendments, and if so applied whether it violates the Constitution.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein will be found in the Appendix, *infra,* pp. 12–14.

STATEMENT

E. Sohier Welch and Sylvester Brown are the executors of the last will of Frank H. Beebe who died on November 20, 1932. (R. 20.) On April 8, 1919, the decedent was appointed co-guardian of the person and estate of his brother, E. Pierson Beebe, who had been adjudged insane, and continued as such until the latter's death on August 8, 1926. (R. 21.) As co-guardian of his brother's

estate, the decedent had the custody of a will drawn by E. Pierson Beebe, prior to his having been declared incompetent, under which the decedent was to receive one-half of his estate. (R. 21.) On February 13, 1924, the decedent transferred in trust the property he expected to receive under the will of E. Pierson Beebe, reserving to himself the income from the property for his life. After his death, the income was to be divided between his nephews and nieces, and after the death of the last survivor, the corpus was to be paid to the living issue of such nephews and nieces. The trust instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24–25.) After the death of E. Pierson Beebe, the decedent on October 22, 1926, by an instrument in writing, ratified and confirmed the original trust instrument, making no change whatever in its provisions. (R. 25–26.)

After the decedent's death, on November 20, 1932, the Commissioner determined that the value of the corpus of the trust should be included in the gross estate on the ground that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) The District Court affirmed the action of the Commissioner and, in so doing,

found it unnecessary to decide whether the case was governed by Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, which section, as amended, specifically covered the case of a transfer with the reservation of a life estate in the transferor.

Upon appeal, the Circuit Court of Appeals held that the tax was invalid since the interest of the decedent in the estate of his brother passed out of his hands by his confirmation of the 1924 trust on October 22, 1926, and that the District Court was in error in holding that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death. The court further held that to apply the provisions of Section 302 (c), as amended, to transfers completed in 1926, was violative of the Fifth Amendment to the Constitution.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Pub. No. 131), and Section 803 (a) of the Revenue Act of 1932, is unconstitutional as applied to transfers made prior to the dates of passage of the amendments.

2. In holding that the value of the property transferred by the decedent by an irrevocable deed of trust under which he reserved the income from

the property to himself for life, should not be included in the gross estate of the decedent under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932.

3. In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. In holding that Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*), as amended, is invalid as applied to transfers made prior to the dates of passage of the amendments, the Circuit Court of Appeals has decided an important question of constitutional law which calls for review by this Court. The Commissioner has heretofore filed a petition for certiorari in *Helvering* v. *Bullard,* No. 349, present Term, which involves the validity of the amendatory Resolution of March 3, 1931, as applied to transfers made after that date. If certiorari is granted in the *Bullard* case, it should, we submit, be granted here so that the Court may consider in its entirety the question of the validity of Section 302 (c) as amended. Moreover, as was pointed out in the petition in the *Bullard* case (p. 8, note 2), that case itself may possibly present the question of the validity of the amended Act as applied to transfers made prior to March 3, 1931.

2. The decision below, we submit, rests upon an erroneous view of the principles governing retroactive taxation.

It is clear from an examination of the Act that its provisions apply to transfers made prior to its passage. Not only does the Joint Resolution of March 3, 1931, itself provide that it should apply "to the extent of any interest therein of which the decedent has *at any time* made a transfer by trust or otherwise" (italics supplied), but Section 302 (h) of the Revenue Act of 1926 (Appendix, *infra*) provides specifically that the provisions of subdivisions (b), (c), (d), (e), (f), and (g) of the Section are applicable to transfers, etc., *"whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act"* (italics supplied).

After the passage of the Joint Resolution, the Treasury Department construed the amendment as applying only to transfers made after its passage. (See T. D. 4336, XI–I Cumulative Bulletin 329.) However, on November 7, 1934, the Commissioner promulgated Regulations 80 (Appendix, *infra*), which provided that such transfers should be included within the gross estate unless the transfer was made prior to March 3, 1931, *and* the decedent died prior to June 6, 1932, the effective date of the Revenue Act of 1932.[1]

[1] The legislative history supports this construction. The amendment was not intended to be "retroactive" only in the sense that it was not meant to apply to estates of decedents whose death had already occurred. Refunds in the amount of 25 million dollars were contemplated in the case of such estates. But it was intended to protect the revenues against

The court below was of the opinion that to apply retroactively Section 302 (c), as amended by Section 803 (a) of the Revenue Act of 1932 (Appendix, *infra*), to a transfer completed in 1926 would amount to a taking of property without due process of law in violation of the Fifth Amendment. But there is nothing *per se* fatal about retroactivity. It is only when the imposition is so arbitrary and capricious as to amount to confiscation that the Fifth Amendment comes into play. Numerous Federal income tax Acts have had retroactive application. That is, they were made to apply to income earned prior to passage of the Act under which the tax was imposed. As early as the case of *Stockdale* v. *Insurance Companies*, 20 Wall. 323, this Court stated, with respect to the retroactive application of an income tax Act (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

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any additional claims. (74 Cong. Rec. 7078, 7199.) Thus Congressman Garner, who stated that the amendment was not to be "retroactive", explained: "The Treasurer estimates that there will be a refund of 25 million to those who have died and had their estate taxed. What we hope in this resolution is to stop up this gap in the future. . . . I have strong hopes that the next Congress will make it retroactive." (74 Cong. Rec. 7199.)

See also *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339; *Cooper* v. *United States*, 280 U. S. 409; *Reinecke* v. *Smith*, 289 U. S. 172.

Similarly, with respect to excise taxes, retroactivity is not of necessity fatal. Cf. *Gwinn* v. *Commissioner*, 287 U. S. 224; *Third National Bank* v. *White*, 287 U. S. 577, affirming *per curiam* 58 F. (2d) 1085 (C. C. A. 1st), affirming 45 F. (2d) 911 (D. Mass.); *Hecht* v. *Malley*, 265 U. S. 144. Where the application of the tax is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 302), it is not arbitrary and unreasonable within the condemnation of the Fifth Amendment. *Milliken* v. *United States*, 283 U. S. 15, is illustrative. In that case, a decedent had made a gift in contemplation of death while the Revenue Act of 1916 was in force. His death, however, occurred after the effective date of the Revenue Act of 1918. The latter statute repealed the former and imposed estate taxes at higher rates. This Court held that the retroactive application of the 1918 Act was not unreasonable. At the time of the transfer the decedent had notice that the transfer probably would be taxed. He therefore should not have been surprised, and to tax his estate under those circumstances was not capricious. In the course of the opinion, this Court said (p. 21):

> But a tax is not necessarily and certainly arbitrary and therefore invalid because

retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court.

Comparable circumstances exist in the instant case. When the trust was confirmed in 1926, the decedent had fair warning that the Government would seek to tax such a transfer. The inclusion of such transfers was regarded as an integral feature of death taxes. See petition in the *Bullard* case, No. 349. The Commissioner had repeatedly construed the provisions of Section 302 (c) as including transfers where life estates had been reserved. See Regulations 37, Art. 24; Regulations 63, Art. 20; Regulations 68, Art. 18; Regulations 70, Art. 18.[2] It seems clear, therefore, that under the facts of this case, Congress was not arbitrarily reaching back into the past. It was simply imposing a tax upon a transfer upon which the decedent had notice that he would probably be taxed. Furthermore, as the grantor lived beyond the dates of the amendatory Acts (which is the only situation

[2] In discussing the Resolution of March 3, 1931, enacted the day following the decisions in *Moreman* v. *Burnet*, 283 U. S. 783; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; and *McCormick* v. *Burnet*, 283 U. S. 784, the Chairman of the Finance Committee, Senator Smoot, said (74 Cong. Rec. 7078): "The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision. * * *. It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide."

where the tax applies, under the Regulations), he could have prevented the operation of the tax by relinquishing his life estate. As was said in *United States* v. *Chase Nat. Bank*, 82 F. (2d) 157, 158:

> She lived several years after the act took effect and she was on notice of its provisions, retaining the reserved powers where she might have given them up to rid her estate of this tax liability. So there has been no denial of rights under the Fifth Amendment.

The decisions in *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, are not to the contrary. The transfers there sought to be included were not made in similar circumstances of administrative construction and understanding of the statutory provision involved.[3]

3. The Bureau of Internal Revenue advises that there are now pending before the Board of Tax Appeals eighty-five cases involving approximately $24,000,000 in taxes, in which the question of the constitutionality of the amendments to Section 302 (c), as applied to transfers made prior to the effective date of the Joint Resolution, is involved.

There are likewise five cases[4] pending in the Cir-

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[3] While life interests were reserved in those cases, the point was not involved; the grantors had died prior to the enactment of the amendatory acts.

[4] *Commissioner* v. *Dahl* (C. C. A. 9th); *Commissioner* v. *Estate of Frances Helen Rawson* (C. C. A. 6th); *Commissioner* v. *Estate of Susan L. Fenimore Cooper* (C. C. A. 2d); *Commissioner* v. *Marshall* (C. C. A. 2d); *Smith* v. *United States* (C. C. A. 1st).

cuit Courts of Appeals, involving approximately $265,000 in taxes, where the same question is presented. One of such cases has been decided against the Government, but the decision has not yet become final. *Commissioner* v. *Marshall* (C. C. A. 2d). Thus it will be seen that the instant case presents a question of vast importance in the administration of the tax laws, which should be finally settled by a decision of this Court.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER, 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) (As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516.) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411.)

[The language in italics represents the new matter added by the 1931 Amendment.]

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of pow-

ers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Sec. 411.)

* * * * * *

Treasury Regulations 80:

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See Section 506 of the Revenue Act of 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 375

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER

v.

E. SOHIER WELCH ET AL., EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119–128) is reported in 90 F. (2d) 833.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for a writ of certiorari was filed September 1, 1937, and was granted October 18, 1937. The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, imposing an estate tax with respect to trusts where the settlor has retained a life interest, may be applied to trusts established prior to the dates of passage of the amendments but where the death of the grantor occurred subsequent thereto.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein will be found in the Appendix, *infra,* pp. 39–44.

STATEMENT

The facts, as found from the evidence by the District Court, pursuant to a stipulation waiving a trial by jury (R. 15), are as follows:

E. Sohier Welch and Sylvester Brown are the executors of the last will of Frank H. Beebe, who died on November 20, 1932. (R. 20.) On April 8, 1919, the decedent was appointed co-guardian of the person and estate of his brother, E. Pierson Beebe, who had been adjudged insane, and continued as such until the latter's death on August 8, 1926. (R. 21.) As co-guardian of his brother's estate, the decedent had the custody of a will drawn

by E. Pierson Beebe, prior to his having been declared incompetent, under which the decedent was to receive one-half of his estate. (R. 21.) On February 13, 1924, the decedent transferred in trust the property he expected to receive under the will of E. Pierson Beebe, reserving to himself the income from the property for his life. After his death, the income was to be divided between his nephews and nieces, and after the death of the last survivor, the corpus was to be paid to the living issue of such nephews and nieces. The trust instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24–25.) After the death of E. Pierson Beebe, the decedent on October 22, 1926, by an instrument in writing, ratified and confirmed the original trust instrument, making no change whatever in its provisions. (R. 25–26.)

After the decedent's death, on November 20, 1932, the Commissioner determined that the value of the corpus of the trust should be included in the gross estate on the ground that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) The District Court affirmed the action of the Commissioner and, in so doing,

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found it unnecessary to decide whether the case was governed by Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, which section, as amended, specifically covered the case of a transfer with the reservation of a life estate in the transferor. (R. 30.)

Upon appeal, the Circuit Court of Appeals held that the tax was invalid since the interest of the decedent in the estate of his brother passed out of his hands by his confirmation of the 1924 trust on October 22, 1926, and that the District Court was in error in holding that the transfer was made in contemplation of death, and intended to take effect in possession or enjoyment after death. The court further held that to apply the provisions of Section 302 (c), as amended, to transfers completed in 1926, was violative of the Fifth Amendment to the Constitution. (R. 127–128.)

While we believe that the Circuit Court of Appeals erred in overruling the District Court on the contemplation of death issue, the Government did not seek review of that question, because of its limited importance in the light of the record, but did ask this Court to review the holding that the amended provisions of Section 302 (c) could not be applied to the trust herein.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, is unconstitutional as applied to transfers made prior to the dates of passage of the amendments.

2. In holding, if it did hold, that the value of the property transferred by the decedent by an irrevocable deed of trust under which he reserved the income from the property to himself for life, should not be included in the gross estate of the decedent under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932.

3. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

I

The validity of the 1931 and 1932 statutes.—In *Helvering* v. *Bullard,* No. 349, present Term, we have maintained that the statute is constitutional as applied to transfers made after March 3, 1931, the date of the first amendment to Section 302 (c). We now consider its validity, challenged under the Fifth Amendment, when applied to trusts created prior to March 3, 1931.

There is nothing *per se* unconstitutional about retroactive taxation. The income tax statutes for

a period of more than seventy years have been uniformly applied, with repeated approval from this Court, to income earned prior to enactment. Nor is there anything peculiar to income taxes which prevents the operation of the Fifth Amendment. A variety of excise taxes and other revenue measures have likewise been given retroactive effect without running afoul of the due process clause. The true test always is whether under the circumstances the tax is arbitrary or unreasonable. And in the relatively few cases in which a tax has been invalidated for its retrospective operation, the basis of decision was that at the time of the transaction giving rise to the tax, one could not reasonably anticipate the liability, and therefore the later taxing statute was arbitrary and capricious. However, where the statute imposing the liability is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 302), the reason for the operation of the Fifth Amendment is absent.

In this case the events leading up to the enactment of the 1931 provisions are of the utmost significance in determining the reasonableness of the tax as here applied. The first Federal estate tax was enacted in 1916. It required, *inter alia*, the inclusion in a decedent's gross estate of transfers "intended to take effect in possession or enjoyment at or after death". That clause was not novel. It had appeared as early as 1826 in the death tax

statute of Pennsylvania, and by the time the Federal estate tax statute was enacted in 1916, it had been incorporated into the laws of at least *forty* States. And in an almost overwhelming number of decisions, both before and after the passage of the 1916 Act, whenever the courts of those States had occasion to construe that clause, it was treated as including a transfer in which the transferor had reserved for his own life the possession or enjoyment (life estate) of the property transferred.

Accordingly, when Congress employed this clause in the 1916 Act it took over language that was rich in meaning, and could reasonably have felt that a like interpretation would be given to it. The Treasury Department repeatedly so construed this clause, and in reliance upon that interpretation was collecting millions of dollars in taxes with respect to such transfers Moreover, in the light of that administrative practice, Congress reenacted this clause in 1919, 1921, 1924, and 1926, and left it unchanged in the Revenue Act of 1928.

However, on March 2, 1931, this Court in three cases held that Congress had not intended to tax such transfers. Congress was greatly disturbed by this interpretation of its intent, and on March 3, 1931, upon the anxious suggestion of the Treasury Department, it passed a Joint Resolution, spelling out with particularity that the disputed clause does include a "transfer under which the transferor has retained for his life * * * the

possession or enjoyment of, or the income from, the property * * *".

Under these circumstances, we respectfully submit that the amendatory provisions are not arbitrary or capricious when applied to a trust created before March 3, 1931, at a time when the decedent could reasonably have anticipated such a tax. The source of the original clause in 1916, the continued and uniform interpretations given it both by the state courts and the Treasury Department, the vast sums collected by the Treasury Department with respect to such transfers—these *facts* of which the decedent could reasonably be put on notice gave fair warning that when he died the Government would seek a similar tax from his estate. The clarifying provisions enacted in 1931 and 1932 do not involve those elements of "novelty and surprise" that were fatal in the case of the few taxes invalidated because of their retroactive operation.

Furthermore, the tax here is even more reasonable since the decedent's death occurred after the enactment of the amendatory provisions and meanwhile he could have rid his estate of the liability by relinquishing his life estate. The fact that he failed to do so does not render this tax arbitrary.

II

The question of construction.—Not only does the Joint Resolution by its terms apply where the decedent has "at any time" created such a trust

reserving a life estate, but Section 302 (h) of the Revenue Act of 1926 unambiguously states that "Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) * * * shall apply to * * * trusts * * * whether made * * * before or after the enactment of this Act". And there is no provision in Section 302 (c) which excludes the operation of Section 302 (h), by "otherwise specifically" providing. We submit that this is so plain that it is conclusive. Under these circumstances, recourse to legislative history is not appropriate. But even if the legislative history be examined, it will be found not to militate against the plain meaning of these words.

ARGUMENT

INTRODUCTION

The decedent, Frank H. Beebe, died on November 20, 1932. The pertinent statutory provisions (Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, Appendix, *infra,* pp. 38–39), were enacted prior thereto. Accordingly, this case does not involve the retroactive imposition of an estate tax in the sense that the law was enacted after the decedent's death. The present controversy should thus be sharply distinguished from cases such as *Commissioner* v. *Wallace,* 71 F. (2d) 1002 (C. C. A. 2d), affirming 27 B. T. A. 902, certiorari denied, 293

U. S. 600, where the settlor died before the effective date of the statute.[1] Since the decedent herein continued to enjoy the income from the trust until the date of his death, which followed the enactment of the applicable statutory provisions, the instant case involves a "retroactive" application of the law only within a restricted meaning of that term.

Whether, when so applied, Section 302 (c), as amended, offends the constitutional guaranty of due process, and whether Congress intended those provisions to apply to trusts created before the amendments of 1931 and 1932, are the two questions now before this Court. The Circuit Court of Appeals held that to impose the tax here "would be a violation of Art. V of the Constitu-

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[1] Similarly, in *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, the decedents had reserved income for life, but death occurred in each case before March 3, 1931. See Record, p. 2, No. 14, 1935 Term; Record, p. 3, No. 36, 1935 Term. Accordingly, the Government did not seek to apply Section 302 (c) in those cases, but rather relied upon Section 302 (d).

Although the grantor in *Helvering* v. *City Bank Co.*, 296 U. S. 85, did reserve the income for life, and did live for a short time after March 3, 1931 (she died May 20, 1931), the Government did not press the application of Section 302 (c), because it was at that time interested primarily in establishing the validity of Section 302 (d), which was squarely presented in that case. It also refrained from relying upon Section 302 (c) because under Regulations 80, Article 18 (b), the pertinent provision in Section 302 (c) was to be applied only where death followed the enactment of the 1932 Act, namely, June 6, 1932, if the transfer had been made prior to March 3, 1931.

tion" (R. 127), presumably intending to refer to the due process clause in the Fifth Amendment. It also stated at the conclusion of its consideration of the constitutional issue (R. 128):

> If doubt exists as to the construction of these statutes, it should be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151.

But since it nowhere discussed the question of statutory construction to determine whether there was a "doubt" as to the proper interpretation of the law, it is at least uncertain under the circumstances whether the court below ruled upon the question of construction.[2]

Accordingly, we will consider first the constitutional validity of the tax as here imposed, and secondly, to remove any doubt, we will undertake to show that Congress plainly intended the result.

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[2] The uncertainty as to whether the court ruled upon anything beyond the constitutional question is increased by the fact that the judge who delivered the opinion recently invoked the same authority in a case involving *solely* a question of constitutional law. *Davis* v. *Edison Electric Illuminating Co. of Boston*, 89 F. (2d) 393, 396 (reversed, *sub nom. Helvering* v. *Davis*, 301 U. S. 619, 672):

"* * * where the application of a taxing statute is doubtful it should be resolved against the government. *Gould* v. *Gould*, 245 U. S. 151 * * *."

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I

SECTION 302 (C) AS AMENDED IN 1931 AND 1932 IS CONSTITUTIONALLY VALID AS APPLIED TO TRUSTS CREATED BEFORE THE CLARIFYING AMENDMENTS WERE PASSED

The asserted invalidity of the tax herein is predicated upon the prohibition contained in the "vague contours of the Fifth Amendment". It is charged that the imposition of this tax is so arbitrary and capricious as to take property from the respondent without due process of law.

In the Government's brief in *Helvering* v. *Bullard,* No. 349, 1937 Term, we have endeavored to show that the amendments are valid as applied to transfers made after their enactment. It is our purpose to show here that they may be constitutionally applied to transfers made before March 3, 1931, the date of the Joint Resolution making the first amendment.

1. There is nothing *per se* fatal about retroactivity. Indeed, the occasions upon which a tax has been declared invalid by reason of its retrospective operation have been relatively infrequent as contrasted with the large number of times when revenue Acts have been applied retroactively. And in the few instances where the tax was invalidated, there were unusual circumstances (not present here, as we will show in detail, *infra,* pp. 19–29) that were deemed to render the taxes so arbitrary that they could not be imposed consistently with due process.

The most familiar of all our revenue measures, namely, the income tax statutes, have uniformly been given retroactive effect. Many of them have reached income earned prior to enactment back to the beginning of the current year, while a few were made applicable to the beginning of the *preceding* year.[3]

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[3] *Before the Sixteenth Amendment.*—The Act of August 5, 1861, c. 45, 12 Stat. 292, 309, was made retroactive to January 1, 1861. The Act of July 1, 1862, c. 119, 12 Stat. 432, 473, enacted increased rates and was retroactive to January 1, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed a further tax of 5% on incomes for 1863. The Act of June 30, 1864, c. 173, 13 Stat. 223, 281, was retroactive to January 1, 1864. The Act of March 3, 1865, c. 78, 13 Stat. 469, 479, was retroactive to January 1, 1865. The Act of March 2, 1867, c. 169, 14 Stat. 471, 477, was retroactive to January 1, 1867. The Act of July 14, 1870, c. 255, 16 Stat. 256, 257, was retroactive to January 1, 1870, in spite of the fact that Congress in the Acts of June 30, 1864, c. 173, 13 Stat. 223, 283, July 13, 1866, c. 184, 14 Stat. 98, 138, and March 2, 1867, c. 169, 14 Stat. 471, 480, had declared that income after January 1, 1870, was not to be taxed. The Act of August 27, 1894, c. 349, 28 Stat. 509, 553, was retroactive to January 1, 1894. The Act of August 5, 1909, c. 6, 36 Stat. 11, 112, Sec. 38, was retroactive to January 1, 1909.

After adoption of Sixteenth Amendment.—The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, was retroactive to March 1, 1913. The Act of September 8, 1916, c. 463, 39 Stat. 756, was retroactive to January 1, 1916. The Act of October 3, 1917, c. 63, 40 Stat. 300, was retroactive to January 1, 1917. The Act of February 24, 1919, c. 18, 40 Stat. 1057, 1058, was retroactive to January 1, 1918. The Act of November 23, 1921, c. 136, 42 Stat. 227, was retroactive to January 1, 1921. The Act of June 2, 1924, c. 234, 43 Stat. 253, 254, was retroactive to January 1, 1924. The Act of February 26, 1926, c. 27, 44 Stat. 9, 10, was retroactive in

Never has the validity of these provisions been open to doubt. As early as *Stockdale* v. *Insurance Companies,* 20 Wall. 323, the Court declared (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

And for a period of more than seventy years the rule there enunciated has been confirmed and applied. *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Cooper* v. *United States,* 280 U. S. 409, 411–412; *MacLaughlin* v. *Alliance Ins. Co.,* 286 U. S. 244; *Reinecke* v. *Smith,* 289 U. S. 172; *Burnet* v. *Wells,* 289 U. S. 670; *United States* v. *Hudson,* 299 U. S. 498. Cf. *Taft* v. *Bowers,* 278 U. S. 470, 483, 484.

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certain respects to January 1, 1925. The Act of May 29, 1928, c. 852, 45 Stat. 791, was retroactive to January 1, 1928. The Act of June 6, 1932, c. 209, 47 Stat. 169, was retroactive to January 1, 1932. The Act of May 10, 1934, c. 277, 48 Stat. 680, was retroactive to January 1, 1934. The Act of June 22, 1936, c. 690, 49 Stat. 1648, was made retroactive to January 1, 1936. The Act of August 26, 1937, Public No. 377, 75th Cong., 1st Sess., was made retroactive in certain respects to January 1, 1937.

Particularly striking was the application of this rule in *Cooper* v. *United States,* 280 U. S. 409. In that case the taxpayer on November 1, 1921, received a gift of securities. On November 7, 1921, she sold those securities for an amount equal to their fair market value at the time of the gift. Under the law and regulations then in force the sale would not have resulted in any taxable gain to her, since the basis for computing gain on sale of property received as a gift was the fair market value of the property at the time of gift. However, on November 23, 1921, the Revenue Act of 1921 was enacted and made retroactive to January 1, 1921. Under the new law, the basis for computing gain was not the value of the securities when received by the taxpayer, but instead their cost to the taxpayer's *donor.* And in that case, the taxpayer was held taxable under the subsequently enacted statute for gain in the amount of some $36,000, although under the law in effect at the time she sold the securities she would not have been subject to any tax from the transaction. Notwithstanding the retroactive application of the Revenue Act of 1921 to produce a new and substantial tax liability after the transaction had been consummated, the Court found that there were no such elements of arbitrariness or caprice as to justify invoking the due process clause.[4]

[4] Similarly, it has been held that the statutory provisions requiring a corporation to use the transferor's basis with respect to property received in a non-taxable exchange may

Although we are probably more familiar with the retroactive application of our tax laws in the field of income taxes, there is nothing in the inherent character of the Fifth Amendment that limits the permissible scope of retroactive tax legislation to income taxes. There is no special aura of favor surrounding the income tax. The test is always the same: Is the tax so arbitrary, capricious, or unfair under the circumstances that the due process clause must be invoked?

Thus, under appropriate circumstances, various excises have been sustained in spite of their retroactive character. See, for example, *Patton* v. *Brady*, 184 U. S. 608; *Billings* v. *United States*, 232 U. S. 261; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. Cf. *Cahen* v. *Brewster*, 203 U. S. 543.

In *Hecht* v. *Malley*, 265 U. S. 144, 164, the taxpayer was an "association" which had been compelled to pay for the year 1918 the corporate "excise" tax imposed by Section 407 of the Revenue Act of 1916. The Court held that the 1916 Act did not apply to this "association", but that the corresponding excise under the Revenue Act of 1918, *passed February 24, 1919* (c. 18, 40 Stat. 1057), did apply to an "association" such as the taxpayer.

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be applied even though the exchange took place before the enactment of such provision. *Newman, Saunders & Co.* v. *United States*, 36 F. (2d) 1009 (C. Cls.), certiorari denied, 281 U. S. 760; *Osburn California Corporation* v. *Welch*, 39 F. (2d) 41 (C. C. A. 9th), certiorari denied, 282 U. S. 850; *Himelhoch Bros. & Co.* v. *Commissioner*, 83 F. (2d) 485 (C. C. A. 6th), certiorari denied, 299 U. S. 572.

Accordingly, the Court denied a refund of the tax collected under the 1916 Act, since in its judgment the retroactive provisions in the Act of February 24, 1919, lawfully created the challenged liability.

Nor are examples wanting in the estate tax field itself. In *Milliken* v. *United States,* 283 U. S. 15, this Court said (p. 21):[5]

> But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court.

See also *Klein* v. *United States,* 283 U. S. 231, 234–235; *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, 166.

In *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming, *per curiam,* 58 F. (2d) 1085 (C. C. A. 1st), affirming 45 F. (2d) 911 (Mass.), this Court sanctioned the inclusion in a decedent's gross estate of the *entire* value (not merely one-half) of a tenancy by the entirety which he had created before 1916, the year the first Federal estate tax statute was enacted.[6]

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[5] In the *Milliken* case, a decedent had made a gift in contemplation of death, while the Revenue Act of 1916 was in force. He did not die, however, until after the effective date of the 1918 Act. The latter statute repealed the former and imposed estate taxes at *much* higher rates. The Court held that the retroactive application of the 1918 Act was not unreasonable.

[6] The same result has been reached by four Federal courts. *Levy's Estate* v. *Commissioner,* 65 F. (2d) 412,

Particularly significant is *United States* v. *Heinszen & Co.*, 206 U. S. 370, where Congress had "ratified" the imposition of certain duties which had been theretofore illegally collected. Recovery was denied to the claimants who contended that the statute deprived them of property without due process of law. See also *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. Those cases are not to be distinguished upon any such insubstantial ground as that they involved merely a "ratification". In both there was a retroactive imposition of a liability that had not existed prior thereto, and to the extent that the question of arbitrariness under the due process clause is concerned, the issue is identical with the present case. Moreover, this Court has recognized that the *Heinszen* and *Rafferty* cases do not rest upon any such tenuous ground as the characterization of the operative statute as a "ratification"; for in *Forbes Boat Line* v. *Board of Commrs.*, 258 U. S. 338, 339, it cited those cases for the proposition that "A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power". See *Graham & Foster* v.

414 (C. C. A. 2d); *Robinson* v. *Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756; *Putnam* v. *Burnet*, 63 F. (2d) 456 (App. D. C.).

Bowers v. *Commissioner*, 90 F. (2d) 790 (C. C. A. 7th), which held to the contrary, is now pending before this Court on writ of certiorari, No. 346, present term.

Goodcell, 282 U. S. 409, 429. Compare *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8; *Citizens Nat'l Bank* v. *Kentucky,* 217 U. S. 443; *Seattle* v. *Kelleher,* 195 U. S. 351; *Locke* v. *New Orleans,* 4 Wall. 172.

Accordingly, it is clear that there cannot be any such categorical rule as that every retroactive tax or excise violates the due process clause. There must be an investigation of the circumstances, and if when everything is considered, the exaction is not arbitrary or capricious, it cannot fail for want of due process. And in the instant case, *the circumstances leading up to the enactment of the Joint Resolution of March 3, 1931, are of primary importance in determining whether the tax imposed with respect to a transfer before that date is arbitrary or capricious.*

2. *The historical setting of the Joint Resolution of March 3, 1931.* The first Federal estate tax law was enacted in the Revenue Act of 1916, c. 463, 39 Stat. 756.[1] Its scope was two-fold: (a) it imposed an excise upon the passing of property at death, and (b) it attempted also to reach certain transfers made during the lifetime of the decedent that could reasonably be regarded as substitutes for testamentary disposition. Among this latter group were irrevocable transfers made "in

[1] The Federal inheritance taxes imposed during the Spanish-American War (Act of June 13, 1898, c. 444, 30 Stat. 448) had long since been repealed (Act of April 12, 1902, c. 500, 32 Stat. 96).

contemplation of death". But Congress did not limit the *inter vivos* transfers which it taxed to gifts made in contemplation of death. It also required the inclusion of transfers "intended to take effect in possession or enjoyment at or after * * * death". Sec. 202 (b) of the Revenue Act of 1916.

That clause was not a novel one. The first death tax statute passed by a State in this country, the Pennsylvania Act of April 7, 1826 (Laws 1826, c. 72, Sec. 1), undertook to deal with property "* * * transferred by deed, grant, bargain or sale, made *or intended to take effect, in possession or enjoyment atfer the death of the grantor* or bargainor * * *". [Italics supplied.] And that provision had been construed by the Supreme Court of Pennsylvania to include a conveyance in fee of certain property including the grantor's residence where the transferee had undertaken to pay over the income to the grantor for life and to permit him the free use of the residence. *Reish, Adm'r.* v. *Commonwealth,* 106 Pa. 521.

By the time the first Federal estate tax law was enacted, this clause had appeared in substantially the same form in the death tax statutes of at least *forty* States.* And such state courts as have had

* Arizona, Laws 1912 (Special Session), c. 15, Sec. 1.
Arkansas, Acts 1901, Act 156, Sec. 1; Acts 1909, Act 303, Sec. 1.
California, Statutes 1893, c. 168, Sec. 1; Statutes 1905, c. 314, Sec. 1.

occasion to construe this clause, both before and after the enactment of the Federal law in 1916, have uniformly treated it as including a transfer

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Colorado, Laws 1901, c. 94, Sec. 23.

Connecticut, Public Acts 1889, c. 180, Sec. 1; Public Acts 1915, c. 332, Sec. 3.

Delaware, Revised Code (1915), c. 6, Sec. 146, p. 86.

Georgia, Acts 1913, p. 91.

Idaho, Laws 1907, p. 558.

Illinois, Laws 1895, p. 302; Laws 1909, p. 312.

Indiana, Laws 1913, c. 47, Sec. 1.

Iowa, Laws 1896, c. 28, Sec. 1; Laws 1911, c. 68, Sec. 1.

Kansas, General Statutes (McIntosh 1915), c. 115, Sec. 11203, Art. 7.

Kentucky, Laws 1906, p. 240, Art. XIX, §1.

Maine, Laws 1893, c. 146, Sec. 1.

Maryland, Laws 1844, c. 237, Sec. 1.

Massachusetts, Acts 1891, c. 425, Sec. 1; Acts 1907, c. 563, Sec. 1; Acts 1912, c. 678, Sec. 1.

Michigan, Pub. Acts 1899, No. 188, Sec. 1.

Minnesota, Laws 1911, c. 372, Sec. 1.

Missouri, Laws 1895, p. 278; Laws 1899, p. 328.

Montana, Laws 1897, p. 88.

Nebraska, Laws 1901, c. 54, Sec. 1; Comp. Stat. (Cobbey 1907), Sec. 11201.

Nevada, Statutes, 1913, c. 266, Sec. 1.

New Hampshire, Laws 1905, c. 40, Sec. 1.

New Jersey, Laws 1892, c. 122, Sec. 1; Laws 1909, c. 228, Sec. 1.

New York, Laws 1885, c. 483, Sec. 1; Laws 1892, c. 399, Sec. 1 (3); Laws 1896, c. 908, Sec. 220 (3).

North Dakota, Laws 1903, c. 171, Sec. 1; Laws 1913, c. 185, Sec. 1 (3).

Ohio, Laws 1893, pp. 14–15.

Oklahoma, Laws 1908, c. 81, Art. XI, Sec. 1; Laws 1915, c. 162, Sec. 1.

Oregon, Laws 1903, p. 50.

Pennsylvania, Laws 1826, c. 72, Sec. 1.

Rhode Island, Acts 1916, c. 1339, Sec. 5 (2).

in which the transferor has retained a life estate, either in form or in substance.'

A transfer with the retention of a life estate was regarded as one of the leading devices employed

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South Dakota, Laws 1905, c. 54, §1.

Tennessee, Laws 1891 (Extraordinary Session), c. 25, Sec. 6; Laws 1893, c. 174, Sec. 1.

Texas, Laws 1907, c. 21, Sec. 1.

Utah, Laws 1901, c. 62, Sec. 1.

Vermont, Laws 1896, No. 46, Sec. 1.

Washington, Laws 1901, c. 55, Sec. 1; Laws 1907, c. 217, Sec. 1.

West Virginia, Laws 1887, c. 31, Sec. 1; Laws 1907, c. 55, Sec. 1 (c); Laws 1909, c. 63, Sec. 1 (c).

Wisconsin, Laws 1903, c. 44, Sec. 1 (3).

Wyoming, Laws 1903, c. 30, Sec. 1.

' *In re Hubbs*, 41 Ariz. 466, 472–473.

Estate of Potter, 188 Cal. 55; see *Kelly* v. *Woolsey*, 177 Cal. 325, 337–338.

Blodgett v. *Guaranty Trust Co.*, 114 Conn. 207, affirmed, 287 U. S. 509; *Hackett* v. *Bankers Trust Co.*, 122 Conn. 107.

Harber v. *Whelchel*, 156 Ga. 601.

People v. *Estate of Moir*, 207 Ill. 180; *People* v. *Kelley*, 218 Ill. 509; *People* v. *Forman*, 322 Ill. 223, 229–230; *People* v. *Moses*, 363 Ill. 423.

Brown v. *Gulliford*, 181 Ia. 897, 899; *Lamb* v. *Morrow*, 140 Ia. 89, 95; *In re Estate of Toy*, 220 Ia. 825.

Crocker v. *Shaw*, 174 Mass. 266, 267; *Worcester C'y Nat. B'k* v. *Com'r. Corp'ns & Tax*, 275 Mass. 216, 220–221.

In re Kutsche's Estate, 268 Mich. 659; *People* v. *Welch's Estate*, 235 Mich. 555.

In re Estate of Marshall, 179 Minn. 233, 238; *In re Estate of Rising*, 186 Minn. 56.

In re Estate of Schuh, 66 Mont. 50, 58–61; cf. *Estate of Oppenheimer*, 75 Mont. 186.

Douglas County v. *Kountze*, 84 Neb. 506; *In re Estate of Bronzynski*, 116 Neb. 196.

In re Brockett, 111 N. J. Eq. 183; *In re Perry*, 111 N. J. Eq. 176; *In re Harvey*, 2 N. J. Misc. 247, affirmed, *sub nom.*

in the attempt to avoid death taxes. It does not seem too much to say that it was *the* type of transfer which was in fact intended to be included by this provision. Under such a transfer, the grantor remained in complete enjoyment of the property during his own lifetime, and merely provided by remainders over for its disposition thereafter. It was not particularly significant that the remainderman's rights vested *in interest* at once. What was significant was that it vested *in possession or enjoyment* only after the grantor's death. That was the situation to which statutes of this type were directed. See *Brown* v. *Gulliford,* 181 Ia. 897, 899. Thus, the Court of Appeals of New York, in con-

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Moore v. *Bugbee*, 3 N. J. Misc. 435, affirmed, 102 N. J. L. 720, writ of error dismissed, 278 U. S. 565; *Carter* v. *Bugbee*, 91 N. J. L. 438, affirmed, 92 N. J. L. 390; *American Bd. Comm'rs* v. *Bugbee*, 98 N. J. L. 84.

Matter of Green, 153 N. Y. 223; *Matter of Brandreth*, 169 N. Y. 437; *Matter of Cornell*, 170 N. Y. 423; *Matter of Keeney*, 194 N. Y. 281, affirmed, 222 U. S. 525; *Matter of Patterson*, 204 N. Y. 677, affirming 146 App. Div. 286; *Matter of Hayes*, 264 N. Y. 448; *Matter of Winters*, 135 Misc. 258; *Matter of Fitzgibbon*, 106 Misc. 130; *Matter of Egerton*, 103 Misc. 471; *Matter of Skinner*, 45 Misc. 539, modified, 106 App. Div. 217; *Matter of Masury*, 28 App. Div. 580, affirmed, 159 N. Y. 532; *Matter of Stephan*, 121 Misc. 596. See *Matter of Bullard*, 76 App. Div. 207, 209.

In re Wallace's Estate, 282 Pac. 760 (Ore.).

Reish, Adm'r v. *Commonwealth*, 106 Pa. 521; *DuBois' Appeal*, 121 Pa. 368; *Husband's Estate*, 316 Pa. 361; *Leffmann's Estate*, 312 Pa. 236; *Estate of Riddle*, 19 Philadelphia 105.

In re Romney's Estate, 60 Utah 173, 180.

In re Ellis' Estate, 169 Wash. 581.

Estate of Waite, 208 Wis. 307.

struing and applying the clause "intended to take effect in possession or enjoyment" at or after death said in *matter of Keeney,* 194 N. Y. 281, 287:

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, *but the one commonly used is a transfer with reservation of a life estate.* We think this fact justified the legislature in singling out this class of transfers as subject to a special tax. [Italics supplied.]

This decision was affirmed by this Court on the constitutional question, *Keeney* v. *New York,* 222 U. S. 525.

A reserved life estate was regarded as even more important than a power of revocation in classifying a transfer as "intended to take effect in possession or enjoyment at or after death". As the Supreme Court of Pennsylvania said in *Spangler's Estate,* 281 Pa. 118, 123, referring to *DuBois' Appeal,* 121 Pa. 368:

> That decedent reserved the right to change his beneficiaries, under the grant there being considered, was not a matter of controlling importance in that case; *the vital fact was that he retained the beneficial enjoyment of the property as long as he lived.* [Italics supplied.]

Compare *Matter of Miller,* 236 N. Y. 290.

Accordingly, when Congress employed this identical and familiar clause in the 1916 Act, it did so

advisedly. It adopted language that was rich in historical meaning. For ninety years, the States had poured into that clause a content that unmistakably included and meant primarily a transfer where the transferor had retained possession or enjoyment for his life. Thus, Congress must reasonably have felt that its use of that clause would be so understood, in the light of the familiar rule that the adoption of a statute of another jurisdiction carries with it the existing construction there placed upon it. Cf. *McDonald* v. *Hovey,* 110 U. S. 619; *Interstate Com. Commiss.* v. *B. & O. Railroad,* 145 U. S. 263, 284; *Scholey* v. *Rew,* 23 Wall. 331, 349; *Knowlton* v. *Moore,* 178 U. S. 41, 52.

The regulations of the Treasury Department repeatedly took the same view. Regulations 37 (editions of August 18, 1919, and January, 1921), Article 24;[10] Regulations 63 (1922), Article 20; Regulations 68 (1924), Article 18; Regulations 70 (1926 ed.), Article 18; Regulations 70 (1929 ed.), Article 18. Millions of dollars in taxes were collected by the Bureau of Internal Revenue over a period of about fifteen years, based upon the assumption that the clause was to be so construed. And during that period, Congress reenacted the estate tax in the Revenue Acts of 1918, 1921, 1924, and 1926, each time retaining word for word

[10] There were two earlier editions of Regulations 37 (October 10, 1916, and May 1917), which, however, were issued in skeleton form, and did not undertake to construe this clause at all.

the clause "intended to take effect in possession or enjoyment at or after his death". Under the familiar rule that the successive reenactment of a statute must be deemed to approve administrative constructions of long standing,[11] the regulations of the Treasury Department and practice of the Bureau of Internal Revenue confirmed and fortified the meaning of this clause.

When, however, the question came before this Court, it declined to give effect to the language of the clause as it had been construed by the state courts and Treasury regulations. On March 2, 1931, it held in three cases that a transfer with the retention of a life estate was not comprehended within the meaning of this clause. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784.[12]

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[11] See *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Old Mission Co.* v. *Helvering*, 293 U. S. 289 293, 294; *Burnet* v. *Brooks*, 288 U. S. 378, 392; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273.

[12] These three cases had been preceded somewhat less than a year before by *May* v. *Heiner*, 281 U. S. 238, where, pursuant to the trust created by the decedent, the income was payable *to her husband for his life*, and after his death to the decedent during her lifetime, with remainder over to their children. That case was radically different from the situations presented in the three cases of March 2, 1931. In *May* v. *Heiner*, the decedent did not retain the possession and enjoyment of the property. And it was doubtful whether she would be entitled to the use of the property even for a short period prior to her death. Accordingly, until the decisions of March 2, 1931, the Treasury Depart-

Congress was greatly disturbed by these cases. On March 3, 1931, Senator Smoot, Chairman of the Finance Committee, declared (Cong. Rec., Vol. 74, Part 7, p. 7078):

> The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision.

He voiced the common understanding that prior to these decisions the statute had generally been regarded as covering such transfers, and stated (*ibid.*):

> The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide.

On the same day, Congressman Hawley, Chairman of the House Committee on Ways and Means, addressed the House with respect to these decisions. He said (Cong. Rec., Vol. 74, Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above. * * * If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income, and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax.

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ment had never regarded *May* v. *Heiner* as a ruling upon the case of a transfer with the complete retention of possession or enjoyment by the transferor.

The Treasury Department was deeply concerned. And upon the anxious suggestions of Ogden L. Mills, Acting Secretary of the Treasury (Cong. Rec., Vol. 74, Part 7, pp. 7198–7199), Congress took the unusual step of enacting on the very day of its introduction the Joint Resolution of March 3, 1931, adding to the clause "intended to take effect in possession or enjoyment at or after his death", the following language:

> including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;

This provision was further amended by Section 803 of the Revenue Act of 1932 (*infra*, p. 39), but not in any respect material here.

3. Accordingly, when Mr. Beebe created the trust in question by the instruments of 1924 and 1926, reserving a life estate to himself, he *then* had every reason to believe that the trust would be included in his gross estate. The origin of the clause from the state statutes, the meaning which had been imparted to it by the state courts, the regulations of the Treasury Department, the fact that the Bureau of Internal Revenue was then collecting taxes from estates of decedents with respect to such transfers—these facts which he could and should have known upon consultation with his attorney when

the trust was created,[18] should have put him on notice that the Government would seek to impose a like tax with respect to his trust.

Our position does not require a reexamination of the three *per curiam* decisions of March 2, 1931. But we do contend that since a contrary result might reasonably have been anticipated in those cases, and since the Treasury was in fact attempting to collect such taxes prior thereto, the decedent had fair warning that a like tax would probably be sought from his estate. He was therefore reasonably put on notice that the Government would obtain clarifying legislation in the event that its interpretation of the statute, although having substantial foundation, should later fail to receive judicial acceptance. Under the circumstances, the application of the amendatory provisions is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 302). It is therefore not arbitrary and unreasonable within the prohibition of the due process clause.

This case is thus sharply to be distinguished from the radically different situations obtaining in *Helvering* v. *Helmholz,* 296 U. S. 93, and *White* v. *Poor,* 296 U. S. 98. The transfers there were made at a time when there could be no similar expectation that they would be subject to such a tax as was

[18] Compare the situation in the *Bullard* case, present Term, No. 349, where, in the preparation of the 1927 trust, the attorney consulted "stated in no uncertain terms" that the transfer was subject to tax. (Record in No. 349, p. 34.)

there sought to be collected. There were no provisions under existing law that could have given comparable color to a claim of taxability. A subsequently imposed tax under those circumstances did carry with it "elements of novelty and surprise" which are not present here.

The present case is more to be assimilated to *Milliken* v. *United States,* 283 U. S. 15, and *United States* v. *Heinszen & Co.,* 206 U. S. 370. It seems clear that under the facts of this case, Congress is not arbitrarily reaching back into the past. It is simply imposing a tax upon a transfer upon which the decedent had notice that he would probably be taxed.

Seattle v. *Kelleher,* 195 U. S. 351, also points the way to the solution of this controversy. There, a special assessment which had been made against certain property had been declared void. (P. 356.) The property was then sold to a bona fide purchaser without notice of any claim that it had been or might be the subject for a special assessment. Thereafter, a statute was passed, authorizing a new assessment. This Court sustained the tax as against the contention that it went beyond the constitutional guaranty of due process. Compare *Citizens Nat'l Bank* v. *Kentucky,* 217 U. S. 443, 454.

Similarly, *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8, involved a special assessment which had been void when assessed, since the state officers who undertook the improvement lacked statutory

authority with respect to both the making of the improvement and the assessment of the tax. The state legislature later "ratified", and this Court held that the tax was valid.[14]

The *Heinszen, Kelleher,* and *Charlotte Harbor Ry.* cases all show that even if the original exaction may have been wholly void, it was sufficient to put the taxpayer on notice that a later and valid tax might be imposed. Accordingly, the subsequent legislative imposition of the liability with respect to the past transaction is free of those "elements of novelty and surprise" that might otherwise render the tax whimsical and arbitrary.

A very different case would be presented if the transfer herein had been made before the enactment of the Revenue Act of 1916, before Congress had employed the clause "intended to take effect", etc. Under such circumstances, the decisions in the *Helmholz* case and *White* v. *Poor* might well be applicable, since the transfer would have been made at a time when there could be no reasonable expectation that it would be taxed.[15] Indeed, the

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[14] Under like principles, this Court has upheld special taxes for local improvements assessed a number of years after the improvements had been made and paid for, prior to any legislation purporting to authorize the assessment. *Wagner* v. *Baltimore*, 239 U. S. 207. Compare *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 534, *et seq.*; *League* v. *Texas*, 184 U. S. 156, 161; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Locke* v. *New Orleans*, 4 Wall. 172.

[15] Thus, to be sharply distinguished, are *Nichols* v. *Coolidge*, 274 U. S. 531, and *Frew* v. *Bowers*, 12 F. (2d) 625 (C. C. A. 2d), where the transfers had been made years be-

Treasury Regulations specifically disclaim any intention to tax such transfers made before September 8, 1916. See Regulations 80, Article 18 (b).

The tax in the instant case is even less open to the charge of arbitrariness or caprice than most retroactive taxes that have been sustained. The decedent lived beyond the dates of the amendatory statutes, and continued to enjoy thereafter the income from the trust created before. He could have prevented the imposition of the tax by relinquishing his life estate. What was said with respect to the holder of the special powers of appointment in *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552, is particularly apposite here:

> She lived several years after the act took effect and she was on notice of its provisions, retaining the reserved powers when she might have given them up to rid her estate of this tax liability. So there has been no denial of rights under the Fifth Amendment.

See also *Porter* v. *Commissioner,* 288 U. S. 436. Cf. *McNair* v. *Knott,* No. 32, October Term, 1937, decided December 13 ,1937.

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fore the first Federal statute which might have been applicable to them. *Bingham* v. *United States*, 296 U. S. 211, and *Industrial Trust Co.* v. *United States*, 296 U. S. 220, are similarly of a wholly different character. So too, in *Coolidge* v. *Long*, 282 U. S. 582, the transfer had been made at a time when Massachusetts was not attempting to impose such a tax with respect to gifts to lineal descendants.

Accordingly there is a complete absence of that arbitrariness that justifies invoking the due process clause, not only because the decedent *in fact* was put on full notice at the time the transfer was made that it might be taxed, but also because he had it completely within his control after the statute was passed to rid his estate of the liability by relinquishing his life interest.

II

THE STATUTE IS PLAINLY APPLICABLE TO TRUSTS CREATED BEFORE THE ENACTMENT OF THE 1931 AND 1932 AMENDMENTS

Although it is not entirely clear from the opinion of the court below whether it ruled upon the applicability of the statute to this trust (see *supra*, p. 11), it is plain from an examination of the Act that transfers made prior to its enactment are within its provisions.

Not only does the Joint Resolution of March 3, 1931, by its terms provide that it should apply "To the extent of any interest therein of which the decedent has *at any time* made a transfer, by trust or otherwise, * * *" [italics supplied], but Section 302 (h) of the Revenue Act of 1926 unequivocally states:

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the *transfers, trusts,* estates, interests, rights, powers, and relinquishment of powers, as

severally enumerated and described therein, *whether made,* created, arising, existing, exercised, or relinquished *before or after the enactment* of this Act. [Italics supplied.]

This provision is clear and explicit. It admits of no interpretation other than its plain language. A transfer made before the enactment of the applicable statutory provision is declared to come within its purview "except as otherwise specifically provided". And there is no other specific provision excluding the operation of Section 302 (h). Surely, Congress in enacting amendments to Section 302 (c) must have been aware of Section 302 (h) and would have "otherwise specifically provided", had it so intended.[16]

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[16] In *Myers* v. *Magruder*, 15 F. Supp. 488 (Md.), the court agreed that Section 302 (h) unquestionably was applicable here (pp. 493–494), but held the tax invalid as violating the Fifth Amendment. *Smith* v. *United States*, 16 F. Supp. 397 (Mass.), does not discuss Sec. 302 (h), and the opinion of the Circuit Court of Appeals for the First Circuit, which affirmed on October 22, 1937, is not further enlightening as to the reasons for striking down the tax.

The Board of Tax Appeals has not been entirely clear as to its reason for holding such transfers non-taxable. In *Whiting* v. *Commissioner*, 35 B. T. A. 100 (on appeal to the Circuit Court of Appeals for the Ninth Circuit) the Board did not even mention Section 302 (h). Similarly in *Kienbusch* v. *Commissioner*, 34 B. T. A. 1248 (on appeal to the Circuit Court of Appeals for the Second Circuit) no reference whatever was made to Section 302 (h). Two decisions of the Board relied upon *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600, where the decedent had died prior to March 3, 1931. *Schneider* v. *Commissioner*, 35

The regulations of the Treasury Department so construe the statute. Regulations 80, Article 18 (b), *infra*. That regulation supersedes an earlier declaration by the Commissioner of Internal Revenue that he would apply the amended provisions prospectively only. T. D. 4314, X–1 Cumulative Bulletin 450.[17] On the question of construction, however, there has been no inconsistency. The earlier ruling proceeded in full recognition of the language of the statute which included trusts theretofore established, but the Commissioner refrained from giving full effect to the provisions, apparently because of a view that to do so might be unconstitutional under the decisions of this Court.[18]

B. T. A. 183; *Dahl* v. *Commissioner*, 35 B. T. A. 282 (on appeal to the Circuit Court of Appeals for the Ninth Circuit). Of course, the Government is not seeking to apply the amendatory provisions of 1931 and 1932 to the estate of any decedent who died before their enactment. In that sense the amendments do not have retroactive effect, and that was all that was involved in the *Wallace* case in this connection. The Board has apparently become entangled in words: since it properly held in the *Wallace* case that the statute should not be "retroactively" applied there, it took over the same term when used in an entirely different connection and proceeded to reach the same result.

[17] The ruling in T. D. 4314 was subsequently incorporated in Regulations 70. See T. D. 4336, XI–1 Cumulative Bulletin 329.

[18] The Commissioner stated that "*notwithstanding the provisions of Section 302 (h)*" he would apply the amendment prospectively only, "in view of" certain decisions of this Court, which ruled primarily upon, or contained implications concerning, the constitutionality of a retroactive application of the statute. T. D. 4314, X–1 Cumulative Bulletin 451. Thus T. D. 4314 clearly recognizes that Sec-

Even if that earlier ruling had been allowed to remain in effect, as it was not, it could not serve to fetter judicial examination of the underlying constitutional question, for "the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application." *Helvering* v. *Powers,* 293 U. S. 214, 224. And even if the earlier ruling were to be regarded as an interpretation of the statutory language, it could have no greater force, in view of the superseding regulation, than the reasons that might be adduced to support it. Cf. *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 133–135.

The provisions of Section 302 (h) are so plain and unambiguous that to make them inapplicable here would require a tortured interpretation that could be extracted only by a *tour de force.* What was said with respect to an analogous situation in *Helvering* v. *City Bank Co.,* 296 U. S. 85, 89, is particularly persuasive here:

> We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can

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tion 302 (h) makes the provisions of Section 302 (c) applicable to transfers made before March 3, 1931, but undertakes, merely because of the constitutional doubts of the then officers of the Treasury, to refrain from applying Section 302 (c) retroactively, "notwithstanding the provisions of Section 302 (h)." As to the constitutional question, we respectfully refer the Court to our discussion, pp. 12–32, *supra.*

be no doubt of the meaning of the words used. The section applies to this transfer.[19]

Cf. *Nardone* v. *United States,* No. 190, October Term, 1937, decided December 20, 1937.

Accordingly, we submit that the challenged statute is not only a valid exercise of Federal power, but also that Congress plainly intended its application to a transfer such as is involved in the present case. The language of Judge Learned Hand in *Cohan* v. *Commissioner,* 39 F. (2d) 540, 545 (C. C. A. 2d), is particularly apt here:

> So it does not seem to us that the situation here calls for so heroic a remedy as to declare the statute unconstitutional, nor indeed for the lesser one of wringing the words out of their natural meaning.

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[19] Thus under the *City Bank Co.* decision, *supra,* it would not be proper to refer to the Congressional debate, attendant the passage of the Joint Resolution on the question of construing a statute plain upon its face. But even if they are examined, it will be seen that they do not support the respondent's contentions as to the applicability of these provisions to transfers made before March 3, 1931. Both the Treasury and Congress were very much disturbed over the fact that the three decisions of March 2, 1931, would result in refunds of about $25,000,000 with respect to taxes collected from estates of transferors *already deceased.* There was some question as to whether Congress would seek to prevent those refunds, and in deciding not to do so there were several statements made on the floor of the House that the statute would not be "retroactive". That the term was employed in this broad sense rather than in the more restricted sense in which it is employed here, is made clear beyond question upon a *full* reading of those debates. See Cong. Rec., Vol. 74, Part 7, pp. 7078–7079, 7198–7199.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1937.

APPENDIX

As originally enacted, Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provided:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

The Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, amended subsection (c) to read as follows (the language in italics representing the new matter):

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the*

property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411 (c).)

Section 302 (c) was further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to read as follows:

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411.)

Section 302 (h) of the Revenue Act of 1926, *supra:*

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f),

and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

Regulations 80 (1934):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Regulations 70 (1929 Edition):

ART. 18. *Reservation of income or an annuity.*—A transfer, not amounting to a bona fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.

* * * * *

Article 18 of Regulations 70 (1926 Edition), and of Regulations 68 (1924) contains in substantially the same language the foregoing provisions of Article 18 of Regulations 70 (1929 Edition).

Regulations 63 (1922):

ART. 20. *Reservation of income.*—A transfer, not amounting to a bona fide sale for a fair consideration in money or money's worth, is taxable where the decedent reserved to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate. Where the decedent reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserved an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the decedent reserved the annuity out of the property conveyed, or payment thereof to him was made by the grantee upon an express or an implied agreement to that effect. * * *

Regulations 37 (1921 Edition):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate.

> Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. * * *

Regulations 37 (1919 Edition), Article 24, contains provisions identical with the foregoing.

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In the

Supreme Court of the United States

OCTOBER TERM, 1937.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER,

v.

E. SOHIER WELCH, ET AL., EXECUTORS, RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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Revenue Act of 1932, §803 (a), 47 Stat. 279 . . 2, 12, 17–18

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In the

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 375.

THOMAS B. HASSETT, Individually and as Former Acting Collector, *Petitioner*,

v.

E. SOHIER WELCH, ET AL., Executors, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119) is reported in 90 F. (2d) 833.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for certiorari was filed on September 1, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932 (which amend Section 302 (c) of the Revenue Act of 1926) should be construed to require that in computing the Federal estate tax of a decedent who died November 20, 1932, there be included in his gross estate the value of property transferred by him in 1926 irrevocably to a trust, under which the income was to be paid to him during his lifetime.

2. Whether, if so construed and applied, such amendments to Section 302 (c) violate the due process clause of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 16–20. The most important clause, for purposes of this case, is that italicized in the following extract from Section 803 of the Revenue Act of 1932 (the italicised portions representing new matter):

> "(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, . . .*"

This substantially re-enacted the amendment made to Sec. 302 (c) by the Joint Resolution of March 3,

1931. Sec. 302 at all times contained subdivision (h), printed on pp. 16–17, *infra*.

STATEMENT.

The decedent, Frank H. Beebe, died November 20, 1932. The respondents are the executors of his will. (Paragraph 1 of declaration admitted by paragraph 1 of amended answer, R. 3, 15.)

On February 13, 1924, the decedent executed an instrument assigning all property which he should receive under the will of his brother (who was then living) to trustees to hold until the death of the survivor of the settlor and certain other named persons, to pay the income to the decedent himself during his lifetime and after his death to pay one-third of the income to a named nephew during his lifetime, and thereafter to the issue of this nephew; one-third of the income to a named niece during her lifetime, and thereafter to her issue; and one-third to the issue of this niece. Upon the death of the last survivor of the named beneficiaries, the principal of the trust estate was to be paid over, one-third to the then living issue of this nephew and two-thirds to the then surviving issue of this niece *per stirpes*, with cross-remainders. The trust instrument contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24, 25, 104–108.)

After the death of the brother of the decedent, the decedent on October 22, 1926, by an instrument in writing ratified and confirmed the original trust instrument, making no change in its provisions. (R. 25, 26, 109.)

In 1926 and 1927, the trustees received the property

to which the settlor became entitled under the will of his brother. They have ever since been holding that property and administering it under the terms of the instruments executed on February 13, 1924, and October 22, 1926. (R. 26.)

The Commissioner determined that the value of the property transferred to this trust should be included in the gross estate, and after the deficiency tax was paid denied a claim for refund. Neither in the deficiency letter nor in the letter denying the claim for refund did the Commissioner rely on the amendment to Sec. 302 (c) of the Revenue Act of 1926. (R. 8, 14.) But by amended answer filed in the District Court on February 13, 1936, the Government did assert this as a defense. (R. 15–17.) The District Court decided the case for the Government on other grounds and did not pass upon the questions involved in this petition.

The holding of the Circuit Court of Appeals on the questions involved in the petition is contained in the following paragraph of its opinion (R. 127):

> "At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. *Heiner* v. *Donnan*, 285 U. S. 312; *Nichols* v. *Coolidge et al.*, Exrs., 274 U. S. 531; *Helvering* v. *Helmholz, supra; Poor* v. *White, supra.*"

ARGUMENT.

I.

It is Clear that the Decision of the Circuit Court of Appeals, that the Amendments to Sec. 302 (c) Would be Unconstitutional if Applied Retroactively, is Correct and is Not in Conflict with the Decision of any other Court.

The petition does not allege that there is any conflict between the decision below and that of any other Circuit Court of Appeals, or indeed of any other court.

All of the decisions in point are in accord. See *Smith* v. *United States,* 16 F. Supp. 397 (D. Mass.); *Myers* v. *Magruder,* 15 F. Supp. 488 (D. Md.); *Commissioner* v. *Marshall,* decided June 28, 1937, and not yet reported, (C. C. A. 2d); *Whiting* v. *Commissioner,* 35 B. T. A. Docket No. 78532, p. 10.

The situation presented in two cases decided by this Court is so similar to that involved in the instant case as to be conclusive of the instant case.

In *Helvering* v. *Helmholz,* 296 U. S. 93, the Court held unconstitutional, as applied to a gift made before its passage, the provision of 302 (d) of the Revenue Act of 1926 that there should be included in the gross estate, in determining the Federal estate tax, property

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

A majority of the Court decided the case on two grounds. The holding on the second ground was expressed in the following language of the opinion (pp. 97, 98):

> "Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If Sec. 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531."

On this last ground all of the members of the Court concurred.

In *White* v. *Poor*, 296 U. S. 98, *supra*, the same provision of the Revenue Act of 1926 was held to offend the due process clause of the Fifth Amendment, as applied to a trust created before its passage.

Section 302 (d) was held to be constitutional as applied to transfers made after its passage.

> *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

It is unconstitutional only insofar as applied to transfers made before its passage.

The same objections which exist to Section 302 (d), as applied retroactively, apply to the Amendments to Sec. 302 (c) if applied retroactively. Each undertakes to include as part of the gross estate a transfer which was complete before the applicable statute was passed.

The corpus of the trust estate irrevocably passed out of the decedent as an individual in 1926; and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect. As in the *Helmholz* case,

there remained no interest in the corpus of the trust in the grantor. The situation is consequently like that presented in *Nichols* v. *Coolidge,* 274 U. S. 531, in which the Court said (p. 542):

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death."

None of the cases relied upon by the petition for certiorari is at all in point.

Gwinn v. *Commissioner,* 287 U. S. 224, involved a joint tenancy, and *Third National Bank* v. *White,* 287 U. S. 577, involved a tenancy by the entirety. For purposes of taxation the Court treated tenancies by the entirety and joint tenancies alike, and held that both are taxable, even if created before the passage of the first estate tax act, because the rights of the survivor in such tenancies did not become finally and definitely fixed before the passage of the Act, and that it was the death of the decedent *after* the passage of the Act which "became the generating source of definite accessions to the survivor's property rights".

Milliken v. *United States,* 283 U. S. 15, held that if a gift in contemplation of death is made after the passage of a provision applicable to it, it is no ground for objection that a substantial re-enactment of that provision in a later Revenue Act taxed it at a higher rate.

The petition here, in quoting from the opinion in that case, omitted the following significant extract from the opinion (283 U. S. at pp. 20–21):

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause. *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582."

Prior to the passage of the Joint Resolution of 1931 there was no provision in any Revenue Act similar to that here relied upon. Provisions in earlier acts were held inapplicable to trusts in which a life interest only was retained, *Burnet* v. *Northern Trust Co.,* 283 U. S. 782.

The petitioner also argues that as the grantor lived beyond the dates of the amendatory acts he could have prevented the operation of the tax by relinquishing his life estate, and quotes language from *United States* v. *Chase National Bank,* 82 F. (2d) 157, 158, in support of that contention. But that was a case where the decedent had retained until her death the power to designate the owner of the corpus of the trust. Because of the retention of that power (which was equivalent to testamentary control over the property) it was held that the corpus of the trust should be included in the gross estate under a statute passed subsequent to the creation of the trust. She did not effectively part with the corpus. Thus the trust was taxable on the same principles as were the revocable trusts under *Porter* v. *Commissioner,* 288 U. S. 436, and those dealt with in the first part of the decision in *Reinecke* v. *Northern*

Trust Co., 278 U. S. 379. But this furnishes no support for the proposition that where the decedent has effectively parted with the title to and control over the corpus of the property and is powerless to do anything in regard to it, the transfer can be retroactively taxed because he did not desire also to give up his right to the income.

Even if the contention made in the language quoted from the *Chase National Bank* case is sound* as applied to the situation there involved, it is clear that it has no application to the situation here involved. An examination of the Government's brief in *Commissioner* v. *Marshall* shows that this very contention was made in the *Marshall* case, which is exactly like the instant case. Nevertheless the Circuit Court of Appeals for the Second Circuit, which decided the *Chase National Bank* case, decided the *Marshall* case in favor of the taxpayer.

This argument of the petitioner seems particularly far-fetched in view of the fact that, during all of the time after the enactment of the amendment until the death of the decedent, the Treasury Department construed the amendment as not applicable to transfers made prior to its passage. (See pp. 10–14, *infra.*) This was not true of the transfer in the *Chase National Bank* case.

None of the other cases cited in the petition involves estate taxes, and none of them seems to us to have any bearing on the question here involved.

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* The language in question was not necessary for the decision in the *Chase National Bank* case. Exactly the same contention might have been made in *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and in *White* v. *Poor*, 296 U. S. 98, *supra*. If it had been sound, those cases would have been decided in favor of the Government instead of in favor of the taxpayers, as they were.

It is true that the constitutionality of retroactive legislation relating to such subjects as income taxes, duties and certain kinds of excise taxes has been upheld. In the field of estate and gift taxes, however, retroactive legislation uniformly has been held invalid. This distinction between retroactive estate or gift taxes and other retroactive taxes is referred to in the opinion in *Reinecke* v. *Smith*, 289 U. S. 172, upholding the retroactive feature of Section 219 (g) of the Revenue Act of 1924, in which it was said (p. 175):

> "Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440, and *Blodgett* v. *Holden*, 275 U. S. 142. *In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction.* In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States*, 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 379." [Italics ours.]

II.

Congress in Passing the Amendments here Involved did not Intend them to Apply to Transfers made Prior to their Passage, and at Least Until 1934 the Treasury Department Construed them as Inapplicable to such Prior Transfers.

The petition for certiorari states that "on November 7, 1934, the Commissioner promulgated Regulations 80 (Appendix, p. 20, *infra*), which provided that such transfers should be included within the gross estate

unless the transfer was made prior to March 3, 1931, *and* the decedent died prior to June 6, 1932, the effective date of the Revenue Act of 1932", and adds in a footnote this astounding statement:

"The legislative history supports this construction."

It then quotes a statement of Congressman Garner to the effect that the Joint Resolution of March 3, 1931, was not to be retroactive, but that he hoped that the next Congress would make it retroactive. The petition fails to mention the fact that Mr. Hawley, member of the Committee on Ways and Means, in explaining the Resolution on the floor of the House said: "It provides that *hereafter* no such method shall be used to evade the tax." [Italics ours.] (Congressional Record, 71st Congress, Third Session, Vol. 74, Part VII, p. 7198.)

The most significant fact is that the Treasury Department, on its understanding of the matter at the time, ruled that the Joint Resolution should be applied prospectively only.

T. D. 4314 (C. B. X-1, p. 450, approved by the Secretary of the Treasury, May 22, 1931)* was an instruction from the Commissioner in the form of a letter "To Collectors of Internal Revenue and Others Concerned." After quoting the language of the amendment this decision reads:

> "In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v.

* This is nowhere mentioned in the body of the petition for certiorari or in the Appendix thereto, which purports to give the statutes and regulations involved. The text of T. D. 4336, which modifies the regulations, is not given anywhere in the petition or in the Appendix thereto. T. D. 4314 and T. D. 4336 are both printed in full in our Appendix, pages 18–19, *infra*.

> *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 P. M., Washington, D. C., time, March 3, 1931."
>
> "Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

(Italics here represent italics in original. We specifically call attention to the fact that the words "prospectively" and "after" were italicized. This Treasury Decision has the same effect as a Regulations, and is to be distinguished from mere rulings of the Bureau, as appears by the explanatory statement on the title page of the Internal Revenue Bulletin itself.)

The amendment to Regulations 70 was formally made on April 11, 1932, by T. D. 4336 (which is printed on pages 19–20, *infra*).

The contemporaneous construction of the Treasury Department should not be disturbed.

Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution, was further amended by Section 803 (a) of the Revenue Act of 1932. We submit that, for the purposes of this case, no change was introduced by the second amendment, and we do not understand that the Government contends to the contrary. At the time that Section 803 of the Revenue Act of 1932 was passed, the position of the Treasury Department, as announced in T. D. 4314 and in Regulations 70, 1929 edition, as amended by T. D. 4336, was

that the amendment would only be applied *prospectively,* as we have shown.*

Thus there is strong basis to conclude that Congress, in passing the 1932 amendment, approved the construction placed by the Treasury Department on the 1931 amendment and intended that Section 302 (c), as amended, should be applied in the case of trusts where life estates were retained, prospectively only—that is, only to those trusts created subsequent to the passage of the 1931 amendment.

The reports of both the House Committee on Ways and Means and the Senate Finance Committee relating

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* This seems to have been followed at least until Article 18 of Regulations 80 was approved on November 7, 1934. (This is printed in on p. 20, *infra.*) Apparently, however, it was not until 1936 that the Government actually contended that the amendment made by Joint Resolution or Section 803 (a) of the Revenue Act of 1932 should be applied retroactively.

Thus in *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, (argued on Oct. 15, 1935, and decided on Nov. 11, 1935) the Commissioner sought to include in the gross estate property transferred to a trust established in 1930. As appears from the opinion of the Circuit Court of Appeals, 74 F. (2d) 242, 243, the decedent died May 20, 1931, after passage of the Joint Resolution under discussion. The trust there in question provided that the income should be paid to the decedent herself until her death or the termination of the trust, after her death to her husband, with gifts over to her children and other descendants. The trust was consequently very similar to the trust here involved. But it does not appear from the opinions of the Board of Tax Appeals, of the Circuit Court of Appeals or the Supreme Court that in any of these tribunals the Government argued that the property could be included because of the Joint Resolution. If there had been any merit in such a contention it is remarkable that the matter was not mentioned in any of the three opinions. The Government lost the case both in the Board and in the Circuit Court of Appeals, and it seems fair to assume that in the argument in the Supreme Court it would have taken the position which it is now taking in the instant case if it had considered it even arguable.

In *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248 promulgated October 28, 1936 it appears affirmatively that the Government did not contend that Section 803 (a) of the 1932 Act could be applied retroactively.

to Section 803 state that its purpose was to clarify in certain respects the amendments made by the Joint Resolution of March 3, 1931, and contain the following language:

> ". . . Certain new matter has also been added *which is without retroactive effect.* . . ." [Italics ours.]
>
> (Report of Committee on Finance, Senate Report No. 665, 72d Congress, 1st Session, p. 49.)

Any reason that could be advanced for making the provisions of the amendment, as clarified, retroactive would be equally applicable to the new matter introduced in the 1932 amendment. The statement of the two committees is therefore of great significance, for it is explicable only upon the basis that the committees believed that the whole subject matter of the 1931 and 1932 amendments to Section 302 (c) would be without retroactive effect.

The petitioner argues that subsection (h) of Sec. 302 requires that the amendments to Sec. 302 (c) be construed retroactively. Exactly the same contention was made and was overruled in *Industrial Trust Company* v. *United States*, 296 U. S. 220, involving Sec. 302 (g) of the Revenue Act of 1926.

The present construction of the Treasury Department*, to which the petition (p. 6) calls attention, appears to us to have no possible support in the language of the statute or in any principles of construction or of constitutional law. There is no decision supporting it.

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* Regulations 80, Art. 18 (b), printed p. 20, *infra*.

CONCLUSION.

The decision below is correct. No decision of any other court is in conflict with it. It is required by previous similar cases decided by this Court.

The Treasury Department is now trying to reverse the position which it originally took and is making contentions which were never advanced until recently. Its erroneous and shifting contentions have forced the respondent executors to fight the case through two courts. It is submitted that they should not be put to the trouble and expense and delay involved in a hearing in this Court, which we believe can result only in an affirmance of what the Court below has decided.

The petition should be denied.

Respectfully submitted,

JOHN L. HALL,
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HENRY HIXON MEYER,
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of Counsel.

September, 1937.

APPENDIX.

STATUTES AND REGULATIONS INVOLVED.

Statutes.

Section 302 of the Revenue Act of 1926 (44 Stat. 70-71) provided:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."
>
> . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g)

of this section shall apply to transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution (Pub. 131) (46 Stat. 1516), approved March 3, 1931, amended subsection (c) to read as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 803 of the Revenue Act of 1932 (47 Stat. 279; 26 U. S. C. § 411 (c)) provided:

"(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an ade-

quate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Regulations.

Internal Revenue Bulletin, Cumulative Bulletin X-1 pp. 450–451.

TRANSFERS BY DECEDENT IN HIS LIFETIME.

REGULATION 70 (1929), ARTICLES 17 AND 18: X-22-5086
General (transfers intended to take effect T. D. 4314
in possession or enjoyment at or after death).

Estate tax—Joint resolution of March 3, 1931.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S.,

238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long*, (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.*, v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury.

Internal Revenue Bulletin, Cumulative Bulletin XI-1, p. 329:

REGULATIONS 70 (1929), ARTICLE 18: Reservation of income or an annuity. XI-16-5455 T. D. 4336

ESTATE TAX—TRANSFERS

Article 18, Regulations 70 (1929 edition, as amended by Treasury Decision 4825 [C. B. IX-1, 356], amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

ART. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoy-

ment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.

OGDEN L. MILLS,
Secretary of the Treasury.

Treasury Regulations 80 (approved Nov. 7, 1934)

ART. 18. Transfers with possession or enjoyment retained. — *(a) Transfers included.* — The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedet subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 P. M., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 P. M., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 375.

THOMAS B. HASSETT, Individually and as Former Acting Collector, *Petitioner*,

v.

E. SOHIER WELCH, ET AL., Executors, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119) is reported in 90 F. (2d) 833.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for certiorari was filed on September 1, 1937, and was granted October 18, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932 (which amend Section 302 (c) of the Revenue Act of 1926) should be construed to require that in computing the Federal estate tax of a decedent who died November 20, 1932, there be included in his gross estate the value of property transferred by him in 1926 irrevocably to a trust, under which the income was to be paid to him during his lifetime.

2. Whether, if so construed and applied, such amendments to Section 302 (c) violate the due process clause of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 39–43. The most important clause, for purposes of this case, is that italicized in the following extract from Section 803 of the Revenue Act of 1932 (the italicised portions representing new matter):

> "(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, . . .*"

This substantially re-enacted the amendment made to Sec. 302 (c) by the Joint Resolution of March 3,

1931. Sec. 302 at all times contained subdivision (h), printed on pp. 39–40, *infra*.

STATEMENT.

The decedent, Frank H. Beebe, died November 20, 1932. The respondents are the executors of his will. (Paragraph 1 of declaration admitted by paragraph 1 of amended answer, R. 3, 15.)

On February 13, 1924, the decedent executed an instrument assigning all property which he should receive under the will of his brother (who was then living) to trustees to hold until the death of the survivor of the settlor and certain other named persons, to pay the income to the decedent himself during his lifetime and after his death to pay one-third of the income to a named nephew during his lifetime, and thereafter to the issue of this nephew; one-third of the income to a named niece during her lifetime, and thereafter to her issue; and one-third to the issue of this niece. Upon the death of the last survivor of the named beneficiaries, the principal of the trust estate was to be paid over, one-third to the then living issue of this nephew and two-thirds to the then surviving issue of this niece *per stirpes* with cross-remainders. The trust instrument contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24, 25, 104–108.)

After the death of the brother of the decedent, the decedent on October 22, 1926, by an instrument in writing ratified and confirmed the original trust instrument, making no change in its provisions. (R. 25, 26, 109.)

In 1926 and 1927, the trustees received the property

to which the settlor became entitled under the will of his brother. They have ever since been holding that property and administering it under the terms of the instruments executed on February 13, 1924, and October 22, 1926. (R. 26.)

The Commissioner determined that the value of the property transferred to this trust should be included in the gross estate, and after the deficiency tax was paid denied a claim for refund. Neither in the deficiency letter nor in the letter denying the claim for refund did the Commissioner rely on the amendment to Sec. 302 (c) of the Revenue Act of 1926. (R. 8, 14.) But by amended answer filed in the District Court on February 13, 1936, the Government did assert this as a defense. (R. 15–17.) The District Court decided the case for the Government on other grounds and did not pass upon the questions involved in this petition.

The holding of the Circuit Court of Appeals on the questions involved in the petition is contained in the following paragraph of its opinion (R. 127):

> "At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. *Heiner* v. *Donnan*, 285 U.S. 312; *Nichols* v. *Coolidge et al.*, Exrs., 274 U.S. 531; *Helvering* v. *Helmholz*, *supra*; *Poor* v. *White*, *supra*."

SUMMARY OF ARGUMENT.

I.

If the amendments to Section 302 (c) of the Revenue Act of 1926 were construed as applicable to the transfer in trust here involved, they would be unconstitutional as violating the Fifth Amendment.

When the transfer in question was made, the Revenue Act did not require its inclusion in the gross estate. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782. The corpus of the trust estate irrevocably passed out of the decedent in 1926, and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect.

There was no transfer at the death of the decedent. The estate tax is a tax upon transfers at death. Although Congress may include in the gross estate gifts which are essentially testamentary in character, the inclusion of any transfers *inter vivos* may be justified only to the extent to which such inclusion is a proper adjunct of the general scheme of the estate tax.

It is established that a transfer in trust, leaving the corpus subject to no control of the donor, is not essentially testamentary in character, even when the donor reserves a life estate. See *May* v. *Heiner*, 281 U. S. 238, 243; *Levy* v. *Wardell*, 258 U. S. 542, 544. Even if Congress may include in the gross estate some transfers which are not essentially testamentary in character, nevertheless a statute which imposes a tax upon them retroactively is capricious and arbitrary.

The situation here involved is similar to that presented in *Levy* v. *Wardell, supra; Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440; and *Helvering* v. *Helmholz*, 296 U. S. 93. The same ob-

jections which were held fatal to the statutes in those cases are present here. This Court has uniformly held unconstitutional provisions of federal statutes seeking to impose a tax on gifts fully consummated before the enactment of any provision imposing a tax upon them.

All of the cases which have decided the precise situation under consideration here have held in favor of the taxpayer.

The contentions made by the petitioner are untenable.

The cases which are cited in support of the position that taxes may be collected retroactively are all distinguishable. They involve entirely different situations and different kinds of taxes. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 175; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429 (*infra*, pages 15–16, 17–18).

Whether a retroactive provision is arbitrary is not to be determined by inquiring whether the person affected had reason to believe that his transaction might be taxed. Any such test would be unworkable. The constitutional power of Congress to include gifts cannot depend upon the date of the issuance of improper regulations; and the promulgation of improper regulations can not give validity to a subsequent act of Congress which would otherwise be invalid.

Moreover, there is no warrant for the petitioner's contention that when the decedent created this trust he "had every reason to believe that the trust would be included in his gross estate". There is no evidence that the decedent actually had knowledge of the regulations, and a decedent cannot be charged with notice of anything except what the law is. At the time when he created the trust, the decision of this Court which was

most nearly in point indicated clearly that such a transfer as he made was not one within the statute then in effect. *Levy* v. *Wardell*, 258 U. S. 542, 544. And this Court subsequently so held. *Burnet* v. *Northern Trust Co., supra.*

There is no merit in the contention of the petitioner that after the passage of the amendment of 1931 the decedent could, by relinquishing his life estate, have prevented imposition of the tax. For until long after the decedent's death, the Treasury Department construed the amendments as not applicable to the trust which he created. Moreover, this contention would put an unwarranted burden on the decedent—giving up his own income. It would not at all affect his control over the corpus of the trust at the time of his death, for he had no control of the corpus.

II.

The amendments to Section 302 (c) of the Revenue Act of 1926 should be construed to apply only to transfers made subsequent to March 3, 1931.

Congress, when passing the Joint Resolution of March 3, 1931, intended it to apply prospectively only, as is shown by the statements made on the Floor of the House by the member in charge of the measure. This was the understanding of the Treasury Department, by which the bill was drafted, and the Treasury Department promulgated regulations showing that it should be applied prospectively only. These have never been modified as to transfers by decedents who died prior to the date of the Revenue Act of 1932, and it was not until after the death of Mr. Beebe that the Treasury Department sought to include transfers such as he made, in

the gross estate, even in the case of decedents dying after 1932.

The re-enactment of the Joint Resolution by Section 803 (a) of the Revenue Act, when the regulations above mentioned were in force, amounted to legislative approval of the Treasury Department's construction of the statute,—that it was to be without retroactive effect.

The reports of the committees in charge of the measure in 1932 show that the purpose of the amendment made at that time was merely to clarify previous amendments, and was not to give retroactive effect to the amendment made in 1931.

The amendments should be construed to apply only prospectively in order to avoid the necessity of declaring them unconstitutional.

The authorities require that wherever possible statutes should be construed to apply prospectively only. It is possible to construe the amendments to have no retroactive effect, and they should be so construed.

ARGUMENT.

I.

IF THE JOINT RESOLUTION OF MARCH 3, 1931, AND THE REENACTMENT THEREOF IN SECTION 803 (a) OF THE REVENUE ACT OF 1932 ARE CONSTRUED TO INCLUDE THE TRUST INVOLVED IN THIS CASE, THEY ARE TO THAT EXTENT INVALID AND VOID AS IN CONFLICT WITH THE PROVISIONS OF ARTICLE V OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INASMUCH AS THOSE STATUTORY PROVISIONS, IF APPLIED TO THIS TRANSFER IN TRUST, WOULD DEPRIVE THE ESTATE OF FRANK H. BEEBE AND THE EXECUTORS THEREOF OF PROPERTY WITHOUT DUE PROCESS OF LAW.

(a) This Conclusion is Required by Recent Decisions of the Supreme Court and is Reached in All the Cases Considering this Precise Question.

The transfer in question was made not later than 1926. On March 2, 1931, this Court held that the provisions of Section 402 (c) of the Revenue Act of 1921 and Section 302 (c) of the Revenue Act of 1924, providing for inclusion in the gross estate of gifts "intended to take effect in possession or enjoyment at or after" death, did not apply to trusts like that involved in the case at bar. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783.

Section 302 (c) of the Revenue Act of 1926 contained exactly the same provision as that just quoted. Prior to March 3, 1931, the Revenue Act contained no provision for the inclusion in the gross estate of property transferred to a trust under which the decedent was entitled to income for life. It is consequently manifest that, under the Revenue Act of 1926, the property transferred to the trust here involved could not be included in the gross estate. The petitioner, however,

now contends that its inclusion is authorized by the amendments to the Revenue Act of 1926 which were passed in 1931 and 1932. (For the language of the 1932 amendment see p. 2, *supra*.) This involves construing the amendments to apply to a transfer made years before their passage. If so construed, the amendments are unconstitutional.

The estate tax is "a tax upon a transfer of his net estate by a decedent." See *Edwards* v. *Slocum*, 264 U. S. 61, 62; *Nichols* v. *Coolidge*, 274 U. S. 531, 537. "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred . . . It is not a gift tax . . ." *Reinecke* v. *Trust Co.*, 278 U. S. 339, 347. It is "a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death." *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 334. "The exaction is not a succession tax . . . The right to become beneficially entitled is not the occasion for it." *Nichols* v. *Coolidge*, 274 U. S. 531, 540.

As this Court said in *Reinecke* v. *Smith*, 289 U. S. 172, 177:

> "Decisions of this court declare that where taxing acts are challenged we look not to the refinements of title but to the actual command over the property taxed,—the actual benefit for which the tax is paid."

The transfer involved in the case at bar was one which occurred in 1926. No transfer occurred at the death of the decedent. No privilege of transferring property was then availed of and no benefit then accrued.

Although it is settled that Congress may include in the gross estate gifts which are essentially testamentary in character, the inclusion of any transfers *inter vivos* may be justified only to the extent to which such inclusion is a proper adjunct of the general scheme of the estate tax.

It seems to be established that a transfer in trust, leaving the corpus subject to no control of the donor, is not essentially testamentary in character, even when the donor reserves a life estate. See *May* v. *Heiner*, 281 U. S. 238, 243; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; and the cases cited above.

In *Helvering* v. *Bullard*, Supreme Court No. 349, October Term 1937, the Government argues that Congress has the power to include such property as an adjunct to its power to impose a tax on a transfer taking place at death. The Government's argument in that case is, in effect, that, if Congress deems it necessary to implement a valid tax scheme, it may reach out and include in the measure of that tax transfers *inter vivos* which would not in themselves be the proper subject of an estate tax. We submit that such an adjunctive power, if it exists, must be strictly circumscribed. A statute which imposes such a tax retroactively on transfers completed at a time when Congress had not indicated its intention to exercise this extraordinary power is, we submit, capricious and arbitrary.

As this Court said in *Nichols* v. *Coolidge*, 274 U. S. 531, 542:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

On this ground this Court has uniformly held unconstitutional provisions of Federal taxing acts seeking to impose a tax on gifts fully consummated before any provision imposing such a tax was enacted. *Levy* v. *Wardell*, 258 U. S. 542; *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson*, 276 U. S. 440; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.

The situation presented in these cases is so similar to that involved in the instant case as to appear to be conclusive of the instant case.

In *Levy* v. *Wardell, supra,* the Court held that certain securities transferred in 1902 and 1907 could not be included in the gross estate under the Revenue Act of 1916. At the time of the transfers, the donees agreed to pay the donor the dividends accruing thereon during her lifetime. The Court said (p. 544):

> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, *and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment,* . . ." [Italics ours.]

In *Helvering* v. *Helmholz, supra,* the Court held unconstitutional, as applied to a gift made before its passage, the provision of 302 (d) of the Revenue Act of 1926 that there should be included in the gross estate, in determining the Federal estate tax, property

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment

thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

A majority of the Court decided the case on two grounds. The holding on the second ground was expressed in the following language of the opinion (pp. 97, 98):

"Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If Sec. 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531."

On this last ground all of the members of the Court concurred.

In *White* v. *Poor*, 296 U. S. 98, *supra*, the same provision of the Revenue Act of 1926—Section 302 (d)—was held to offend the due process clause of the Fifth Amendment, as applied to a trust created before its passage.

Section 302 (d) was held to be constitutional as applied to transfers made after its passage.

Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

It is unconstitutional only insofar as applied to transfers made before its passage.

The same objections which exist to Section 302 (d),

as applied retroactively, apply to the amendments to Sec. 302 (c) if applied retroactively. Each undertakes to include as part of the gross estate a transfer which was complete before the applicable statute was passed.

The corpus of the trust estate irrevocably passed out of the decedent as an individual in 1926; and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect. As in the *Helmholz* case, there remained no interest in the corpus of the trust in the grantor. The situation is consequently like that presented in *Nichols* v. *Coolidge*, 274 U. S. 531, *supra*, in which the Court said (p. 542):

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death."

The estate tax is paid by the executor and consequently is borne in effect by the residuary legatee under the will. It is clear that the executor has no right to compel the trustee or remaindermen under the trust to pay or contribute to the federal estate tax. *Bemis* v. *Converse*, 246 Mass. 131; *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488; Cf. *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

All of the decisions in cases involving the precise point under consideration have held that the amendments could not be constitutionally applied to irrevocable transfers completed before their enactment. In

addition to cases in the First Circuit, the following have decided the point—*Commissioner* v. *Marshall*, 91 F. (2d) 110 (C. C. A. 2d); *Bullard* v. *Commissioner*, 90 F. (2d) 144 (C. C. A. 7th); *Meyers* v. *Magruder*, 15 F. Supp. 488 (D. Md.) (not appealed by the Government); *Collins* v. *United States*, C. E. D. Va. Nov. 29, 1937, 384 C. C. H., ¶ 9035. There are a number of cases to the same effect in the Board of Tax Appeals. See, for example, *Whiting* v. *Commissioner*, 35 B. T. A. 100. See also *Matter of Craig*, 97 ~~App. Div.~~ 289, aff'd 181 N. Y. 551. 4th Div.

(b) The Contentions Made by the Petitioner are Untenable.

The petitioner's brief states that "there is nothing *per se* fatal about retroactivity" and cites a large number of statutes and decisions dealing with income taxes and *inheritance taxes*.

But the distinction between the effect of retroactivity in the case of estate and gift taxes, on the one hand, and in the case of taxes of certain other character, such as income taxes, is well understood. It is clearly expressed in the opinion in *Reinecke* v. *Smith*, 289 U. S. 172, where Section 219 (g) of the Revenue Act of 1924, taxing the grantor upon the income of a trust which he had the right to revest in himself, was upheld as to income from a trust created prior to its passage. The Court said (p. 175):

> "Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440, and *Blodgett* v. *Holden*, 275 U. S. 142. *In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction.* In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but

> the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States,* 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379." [Italics ours.]

The case of *Cooper* v. *United States,* 280 U. S. 409, (heavily relied upon by the petitioner) was an income tax case. Certainly Congress may change the method of computing the income tax, and such changes may produce results from prior transactions which were not contemplated when the transactions were made.

The citations of inheritance tax statutes and cases under them add nothing novel or valuable to the questions here discussed. Objectionable retroactivity is not involved in any of those cases because the tax is imposed by excises upon the right to receive property. See *Coolidge* v. *Long,* 282 U. S. 582, 596 and also dissenting opinion therein (which involved the same trust involved in *Nichols* v. *Coolidge,* 274 U. S. 531), *Blodgett* v. *Guaranty Trust Co.,* 287 U. S. 509.

On page 16 of his brief, the petitioner states that *under appropriate circumstances* various excises have been sustained in spite of their retroactive character. [Italics ours.] Without extended discussion, we submit the following comment upon the cases cited for this proposition.

Patten v. *Brady,* 184 U. S. 608, does not involve any question of retroactivity at all. *Billings* v. *United States,* 232 U. S. 261 (annual excise on the use of yachts), *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, and *Hecht* v. *Malley,* 265 U. S. 144 (corporate excise tax based on income) indicate no more than that, on reasoning analogous to that used in the income tax cases,

excise taxes for an annual period may comprise transactions within the annual period for which they are applied. *Cahen* v. *Brewster*, 203 U. S. 543, involved an inheritance tax, not an estate tax.

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226, is similar to and follows *United States* v. *Heinszen & Co.*, 206 U. S. 370. They are cases of the specific ratification by Congress of the collection of taxes imposed by governmental action, and, as shown by the opinion in the *Heinszen* case, are based squarely on the right of a principal to ratify acts of an agent assumed to be done on behalf of the principal. *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, is another ratification case.

We do not understand that the petitioner asserts that the amendments to Section 302 (c) of the Revenue Act of 1926 constituted a ratification of the prior illegal regulations. Certainly, the amendments did not purport to be ratifications, and it is significant that the Treasury Department itself showed clearly by the regulations which it promulgated on May 22, 1931, and April 11, 1932, that it did not construe them as ratifications. (See pp. 30–31, *infra*.)

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, a valid tax was collected after the period of limitations had run. The statute there considered involved the prohibition of a refund. The Court pointed out that this was not a case of creating liability as to a transaction to which no liability had previously attached, and said (p. 429):

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative

> intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

Within the same principle falls *Swayne & Hoyt, Limited,* v. *United States,* 300 U. S. 297.

Other cases cited by the petitioner relate to the assessment and collection of local taxes on real estate and personal property—*Citizens National Bank* v. *Kentucky,* 217 U. S. 443; *Seattle* v. *Kelleher,* 195 U. S. 351; and *Locke* v. *New Orleans,* 4 Wall. 172. The nature of these taxes is so different from estate taxes that these cases have no application.

We submit that none of the cases referred to above furnishes any ground for suggesting that retroactivity of the character involved in this case is not a fatal objection to retroactive gift and estate taxes, and that none of said cases is in point.

We consequently pass to the cases involving estate taxes which are cited by the petitioner.

Milliken v. *United States,* 283 U. S. 15, held that if a gift in contemplation of death is made after the passage of a provision applicable to it, it is no ground for objection that a substantial re-enactment of that provision in a later Revenue Act taxed it at a higher rate.

Petitioner's brief quotes a sentence from the opinion in that case, but not the following significant extract (283 U. S. at pp. 20–21):

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause. *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582."

The reason for the decision is contained in the following language of the opinion (p. 24):

> "The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was fore-warned at the time he elected to exercise the privilege, did not change its character."

In the instant case, however, the gift was not subject to any excise when made.

Third National Bank v. *White*, 287 U. S. 577, involved a tenancy by the entirety. For purposes of taxation the Court has treated tenancies by the entirety and joint tenancies alike, and held that both are taxable, even if created before the passage of the first estate tax act, because the rights of the survivor to the property held in such tenancies did not become finally and definitely fixed before the passage of the Act, and that it was the death of the decedent *after* the passage of the Act which "became the generating source of definite accessions to the survivor's property rights".

The only other cases involving estate taxes cited in support of this contention of the petitioner are *Klein* v. *United States*, 283 U. S. 231, 234–235, and *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160, 166. Neither of these cases involved application of a new provision of the statute to a gift which the Court regarded as transferring the entire interest in the corpus before its passage, and neither of them supports the reasoning of the petitioner.

The petitioner argues that there must be an investigation of the circumstances to determine whether a

retroactive provision is arbitrary, that the answer must depend on whether the decedent or other person affected had reason to believe that his transaction might be taxed, and that in the instant case the decedent did have reason so to believe. We submit that each link in this argument is unsound.

First. There is no such test as whether the person affected had reason to believe that his transaction might be taxed.

In *Untermyer* v. *Anderson,* 276 U. S. 440, this Court held that the gift tax imposed by the Act of June 2, 1924, must be construed as applicable to gifts made in 1924 prior to its passage but that it could not be constitutionally applied to a gift made on May 23, 1924, some three months after a bill providing for a gift tax was presented, and while the conference report on the bill was pending. The bill finally passed both houses on May 25, 1924. The Court said (pp. 445–446):

> "The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures."

The test which the petitioner suggests would make constitutional rights depend upon considerations more vague than those rejected in the *Untermyer* case, for

his reasoning seems to be that the transaction may properly be taxed, although it was not taxable at the time when it occurred, if an executive department has erroneously construed the act in force at the time of the transaction as imposing the tax.

The test comes down to this—had the donor reason to believe that an existing act would be construed to mean something different than what it did mean? If a donor is chargeable with notice, it must be with notice of the true interpretation of the law and not with notice of incorrect interpretations expressed by a governmental department.

The argument of the petitioner is based largely upon the fact that the original estate tax act (that of 1916) contained a provision for the inclusion of gifts to take "effect in possession or enjoyment at or after" death and that the regulations of the Treasury Department took the view that this included a trust under which the settlor reserved the income for life. But (as his brief admits) the two earliest editions of the regulations contained no such provision, and such a provision did not appear until other regulations were promulgated in August, 1919. It would seem that the contention of the petitioner would not apply to gifts made prior to 1919. This would produce a curious result, *i. e.* that the Joint Resolution of 1931 could be constitutionally applied to transfers made after a certain day in August, 1919, but not to transfers made before that time. In other words, the constitutional power of Congress to include gifts would depend upon the date of the issuance of invalid regulations.*

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* *Whiting* v. *Commissioner*, 35 B. T. A. 100 (now pending in the Circuit Court of Appeals for the Ninth Circuit) in-

The unworkability of the test suggested in the petitioner's brief is well demonstrated by the situation dealt with in the cases of *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and *White* v. *Poor*, 296 U. S. 98, *supra*. The petitioner attempts to distinguish these cases, by saying in his brief (pp. 29–30): "The transfers there were made at a time when there could be no similar expectation that they would be subject to such a tax as was there sought to be collected. There were no provisions under existing law that could have been given comparable color to a claim of taxability".

The petitioner has overlooked the fact that the Government did contend (see *Reinecke* v. *Northern Trust* Co., 278 U. S. 339, 342, and 345–346), that the broad general provisions of Section 402 of the 1918 and 1921 Acts included tranfers in trust like those involved in the *Helmholz* and *White* cases made before the passage of Section 302 (d) of the Revenue Act of 1926, which specifically included such transfers. Moreover in the *White* case, the transfer in trust was made in 1919 and a part of the income under the trust was payable to the grantor for life. Would the petitioner go so far as to contend that because of regulations then in force the decedent should have realized that her property transferred might be included in the gross estate, and consequently that her executors could not object to the retroactive application of a later provision (Section 302

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volved a transfer made in 1917 in trust under which the grantor was to receive the income for life. At the time when this was made, there was no regulation of the Treasury Department providing that property so transferred should be included in the gross estate. The logical result following the argument of the petitioner seems to be that such a transfer could not be subjected to the estate tax. Such a differentiation seems to us to be impossible and to illustrate the difficulties with the argument which the petitioner makes.

(d) of the Revenue Act of 1926), seeking to include it in the gross estate on another ground? This would seem to follow if the test is, as the petitioner suggests, whether the regulations of the Treasury Department were such as to lead the decedent to believe that the transfer might be taxed.

Second. Equally unsound is the final link in the argument of the petitioner, *i. e.* that the situation was such that when the decedent created the trust in question "he *then* had every reason to believe that the trust would be included in his gross estate".

The argument to this effect is preceded by a long discussion of the provisions of state taxes and the regulations of the Treasury Department and other matters. Although the brief states that its position "does not require a re-examination of the three *per curiam* decisions of March 2, 1931",* most of the argument seems to be designed to support the statement made in the brief (p. 23) that "It does not seem too much to say that it [a transfer with retention of life estate] was *the* type of transaction which was in fact intended to be included by this provision". We submit that the decisions of March 2, 1931, give all of this line of argument its quietus. The contentions which are made in this part of the brief and the material in support thereof are substantially the same as what appears in the Government's briefs on the merits of those three cases. Regardless of the opinion which may have been entertained by some members of the Treasury Department and some members of Congress, the fact remains that this Court held that Congress did not intend to

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* *Burnet v. Northern Trust Co.*, 283 U. S. 782, *supra; Morsman* v. *Burnet*, 283 U. S. 783, *supra; McCormick* v. *Burnet*, 283 U. S. 784.

include such transactions in the Revenue Acts in force prior to 1931. The decision of the Court in effect was that the regulations of the Treasury Department were unwarranted. The argument of the petitioner consequently resolves itself into this proposition: If the Treasury Department construes an act improperly, its arbitrary action validates a retroactive act which would otherwise be invalid.

The petitioner argues that it is important to ascertain what a donor would have believed as to the taxability of his gift at the time when he made it. There is nothing in the record to show that the decedent here actually knew that such Treasury regulations had been promulgated. Everything in the evidence is to the contrary. (See testimony of Welch, R. 45; testimony of Meyer, R. 56.) If there is any inference as to what the decedent should have believed, it must be that he would have believed the law to be as this Court decided in the three cases above cited. Certainly a taxpayer cannot be expected to familiarize himself with the laws and decisions of all of the States of the Union; and an erroneous Treasury ruling is no basis for his assuming that Congress will change the law, even prospectively, to read as the Treasury Department thought it should be, and still less gives any warning that there will be future retroactive legislation.

If in 1926 the decedent had made an examination of the law, he would have seen that *Levy* v. *Wardell,* 258 U. S. 542, 544, decided in 1922, (p. 12, *supra*) had held that a trust similar to the one he was creating was not one "intended to take effect in possession or enjoyment" at death.

The brief for the petitioner finally asserts that the tax "is even less open to the charge of arbitrariness or caprice than most retroactive taxes that have been sustained" because the decedent "could have prevented the imposition of the tax by relinquishing his life estate". This seems to us to be a most extraordinary position for the Government to take. Soon after the amendment of March 3, 1931, was passed (on May 22, 1931), the Secretary of the Treasury issued formal rulings to the effect that it was not to apply to transfers made before its passage. (See p. 30, *infra.*) This position was adhered to at all times up to the date of the death of the decedent and, indeed, for several years thereafter.

The position of the Government consequently is that the estate should be penalized because the decedent did not do something which the Treasury Department by its regulations in effect stated was unnecessary. It had given the country its assurance that it would not attempt to tax such a transaction, but it now seeks to justify the levying of the tax on the ground that the donor should have distrusted it!

The petitioner insists that the donor should have been warned by its regulations in 1926 (although they were held invalid by this Court during his lifetime) but that on the other hand he should have disregarded its regulations of 1931. Its contentions leave us in a maze of inconsistencies.

The petitioner, in support of the argument last mentioned, quotes language from *United States* v. *Chase National Bank,* 82 F. (2d) 157, 158 (C. C. A. 2nd.) But that was a case where the decedent had retained until her death the power to designate the owner of the corpus of the trust. Because of the

retention of that power (which was equivalent to testamentary control over the property), it was held that the corpus of the trust should be included in the gross estate under a statute passed subsequent to the creation of the trust. She did not effectively part with the corpus. Thus the trust was taxable on the same principles as were the revocable trusts under *Porter* v. *Commissioner*, 288 U. S. 436, and those dealt with in the first part of the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 379. But this furnishes no support for the proposition that where the decedent has effectively parted with the title to and control over the corpus of the property and is powerless to do anything in regard to it, the transfer can be retroactively taxed because he did not desire also to give up his right to the income.

Even if the contention made in the language quoted from the *Chase National Bank* case is sound* as applied to the situation there involved, it is clear that it has no application to the situation here involved. An examination of the Government's brief in the Circuit Court of Appeals in *Commissioner* v. *Marshall*, shows that this very contention was made in the *Marshall* case, which is exactly like the instant case. Nevertheless the Circuit Court of Appeals for the Second Circuit, which decided the *Chase National Bank* case, decided the *Marshall* case in favor of taxpayer.

As we have stated, this argument of the petitioner

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* The language in question was not necessary for the decision in the *Chase National Bank* case. Exactly the same contention might have been made in *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and in *White* v. *Poor*, 296 U. S. 98, *supra*. If it had been sound, those cases would have been decided in favor of the Government instead of in favor of the taxpayers, as they were.

seems particularly far-fetched in view of the fact that, during all of the time after the enactment of the amendment until the death of the decedent, the Treasury Department construed the amendment as not applicable to transfers made prior to its passage. This was not true of the transfer in the *Chase National Bank* case.

If we disregard the question whether such relinquishment as that suggested in the *Chase National Bank* case might not in itself involve a tax, the transaction would not have diminished the decedent's resources. In the case of a trust under which he has a life estate, cases of great hardship can easily be imagined. Certainly it would involve the loss of income for life. It might leave him in want. His only alternative (under the Government's theory) would be to subject his remaining estate to an estate tax, which might completely consume it.

II.

THE AMENDMENT TO SECTION 302 (c) OF THE REVENUE ACT OF 1926 MADE BY THE JOINT RESOLUTION OF MARCH 3, 1931, AND BY SECTION 803 (a) OF THE REVENUE ACT OF 1932, SHOULD BE CONSTRUED TO APPLY ONLY TO TRANSFERS MADE SUBSEQUENT TO MARCH 3, 1931.

The statutes above referred to are copied on pp. 39–41, *infra*.

We contend that the amendment should not be construed to apply to transfers made prior to its passage.

(a) Congress when passing the Joint Resolution of March 3, 1931 intended it to apply prospectively only.

The amendment of March 3, 1931, was drafted by the Department of the Treasury and submitted to the Speaker of the House of Representatives with a letter from the Secretary of the Treasury suggesting its early passage in view of the decisions the day before in *Burnet* v. *Northern Trust Company*, 283 U. S. 782, and other cases. In the opinion in the *Northern Trust Company* case, the Court said that there was "no question of the constitutional authority of the Congress to impose *prospectively* a tax with respect to transfers or trusts of the sort here involved". [Italics ours.]

The resolution was reported from the Committee on Ways and Means by a member of that Committee, Mr. Hawley, who, in explaining it on the floor of the House, said, "It provides that *hereafter* no such method shall be used to evade the tax." [Italics ours.] In the House, Mr. Garner of the Ways and Means Committee said:

> "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retro-

> active for the reason we were afraid that the Senate would not agree to it."

(Congressional Record, Seventy-First Congress, Third Session, Vol. 74, Part 7, pp. 7198–7199.)

As the brief for the respondent in No. 484 points out, it is fair to assume that Congress and the Treasury Department were in accord as to its meaning, as the Resolution was drafted by the Treasury Department and passed at its earnest request. A reading of the Congressional Record shows that the Congressmen and Senators who made statements on the floor got their views from the Treasury Department, which drafted the bill, and, as we point out hereafter, it is clear that the Treasury Department understood the measure as not providing for retroactive operation.

It is, of course, well recognized that the expressions of intention by Congressional Committees and spokesmen for the bill in Congress may be resorted to in the aid of the construction of the statutes to which they relate, if their meaning is not free from doubt.

See *Humphrey's Executor* v. *United States,* 295 U. S. 602, 624; *United States* v. *Great Northern Ry. Co.,* 287 U. S. 144, 154.

(b) The Treasury Department ruled that the amendment should be applied prospectively only, and that construction should not be set aside.

The Treasury Department itself ruled that the amendment should be applied prospectively only.

T. D. 4314 (C. B. X-1, p. 450, approved by the Secretary of the Treasury, May 22, 1931) was an instruction from the Commissioner in the form of a letter "To Collectors of Internal Revenue and Others Concerned." After quoting the language of the amendment this decision reads:

> "In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 P. M., Washington, D. C., time, March 3, 1931."
>
> "Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

(Italics here represent italics in original. We specifically call attention to the fact that the words "prospectively" and "after" were italicized. This Treasury Decision has the same effect as a Regulations, and is to be distinguished from mere rulings of the Bureau, as appears by the explanatory statement on the title page of the Internal Revenue Bulletin itself.)

The amendment to Regulations 70 was formally made on April 11, 1932, by T. D. 4336 (which is printed on pages 42–43, *infra*).[1]

The contemporaneous construction of the Treasury Department should not be disturbed.

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[1]The practice of the Treasury Department has never been changed as to decedents dying prior to June 6, 1932; and until November 7, 1934 the Government never took the position that the amendment made by the 1932 Act applied retroactively. (As the brief for respondent in No. 484 points out, there is no basis for distinction between the two amendments.) The Government had not taken this position at the time of the death of the decedent here or at the time when the estate tax return was filed, November 14, 1933. Neither in the deficiency letter, dated February 8, 1935, nor in the letter denying claim for refund, dated June 11, 1935, did the Commissioner rely on the amendment to Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) Although the regulation of November 7, 1934, did purport to require the inclusion of trusts like that here involved in the gross estates of decedents dying after June 6, 1932, the Government does not appear actually to have relied upon it until several years later.

Thus in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, (argued on Oct. 15, 1935, and decided on Nov. 11, 1935) the Commissioner sought to include in the gross estate property transferred to a trust established in 1930. As appears from the opinion of the Circuit Court of Appeals, 74 F. (2d) 242, 243, the decedent died May 20, 1931, after passage of the Joint Resolution under discussion. The trust there in question provided that the income should be paid to the decedent herself until her death or the termination of the trust, after her death to her husband, with gifts over to her children and other descendants. The trust was consequently very similar to the trust here involved. But it does not appear from the opinions of the Board of Tax Appeals, of the Circuit Court of Appeals or the Supreme Court that in any of these tribunals the Government argued that the property could be included because of the Joint Resolution. If there had been any merit in such a contention it is remarkable that the matter was not mentioned in any of the three opinions. The Government lost the case both in the Board and in the Circuit Court of Appeals, and it seems fair to assume that in the argument in the Supreme Court it would have taken the position which it is now taking in the instant case if it had considered it even

(c) The re-enactment of the Joint Resolution by Section 803 (a) of the Revenue Act of 1932 amounted to legislative approval of this construction of the statute.

Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution, was further amended by Section 803 (a) of the Revenue Act of 1932. We submit that, for the purposes of this case, no change was introduced by the second amendment. At the time when Section 803 of the Revenue Act of 1932 was passed, the position of the Treasury Department, as announced in T. D. 4314 and in Regulations 70, 1929 edition, as amended by T. D. 4336, was that the amendment would only be applied *prospectively,* as we have shown.

We invoke the principle of statutory construction, of frequent application to revenue acts, that the re-enactment of a statutory provision in the light of approved and published executive construction of the statute amounts to an implied legislative recognition and approval of such executive construction of the statute. *Murphy Oil Company* v. *Burnet,* 287 U. S. 299, 307; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273; *United States* v. *Dakota-Montana Oil Company,* 288 U. S. 459, 467.

The fact that the 1932 amendment introduced no substantial change, as far as this case is concerned, into Section 302 (c) as amended by the Joint Resolution of March 3, 1931, and was enacted in the light of the pub-

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arguable. The brief of the petitioner admits that the Government did not take that position in that case. (Footnote, p. 10.)

In *Kienbusch* v. *Commissioner,* 35 B. T. A. Docket No. 80550 (promulgated October 28, 1936) it appears affirmatively that the Government did not contend that Section 803 (a) of the 1932 Act could be applied retroactively.

lished Treasury Decisions and amendment of the estate tax Regulations above referred to, gives strong basis to conclude that Congress, in passing the 1932 amendment, approved the construction placed by the Treasury Department on the 1931 amendment and intended that Section 302 (c), as amended, should be applied in the case of trusts where life estates were retained, prospectively only—that is, only to those trusts created subsequent to the passage of the 1931 amendment.

The reports of both the House Committee on Ways and Means and the Senate Finance Committee relating to Section 803 state that its purpose was to clarify in certain respects the amendments made by the Joint Resolution of March 3, 1931, and stated:

> ". . . Certain new matter has also been added *which is without retroactive effect. . . .*" [Italics ours.]
>
> (Report of Committee on Finance, Senate Report No. 665, 72d Congress, 1st Session, p. 49).

Any reason that could be advanced for making the provisions of the amendment, as clarified, retroactive would be equally applicable to the new matter introduced in the 1932 amendment. The statement of the two committees is therefore of great significance, for it is explicable only upon the basis that the committees believed that the whole subject matter of the 1931 and 1932 amendments to Section 302 (c) would be without retroactive effect.

(d) The amendment should be construed to apply only prospectively in order to avoid declaring it unconstitutional.

As we have shown above (pp. 9–15) the amendment to Section 302 (c) of the Revenue Act of 1926, if applied to transfers made prior to its passage, is unconstitutional. Under the circumstances, the case presents the occasion for this Court to construe the statute as not being retroactive in accordance with the following principle stated in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

See also, to the same effect, *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific R. R. Co.* v. *Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577; *Russian Fleet* v. *United States*, 282 U. S. 481, 492.

(e) The authorities require that, wherever possible, statutes be construed to apply prospectively only.

This Court has uniformly construed taxing acts as being prospective merely wherever the language of the Act was in any possible way susceptible of such construction.

See, for example, *Shwab* v. *Doyle*, 258 U. S. 529, where the Court held that the estate tax levied by the Revenue Act of 1916 which included in the estate of a decedent property which the decedent "has at any time made a transfer . . . in contemplation of or intended to take effect at or after death" did not apply to a

transfer made prior to the enactment of the statute, saying (p. 537):

> ". . . a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

In *Bingham* v. *United States*, 296 U. S. 211, § 402 (f) of the Act of 1918, which provided for inclusion in the gross estate the value of all property "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries [*i. e.* except the executor] as insurance under policies taken out by the decedent upon his own life", was held not to apply to policies taken out by decedent and assigned by him to the beneficiaries before the original enactment of the statute.

This case was followed in *Industrial Trust Co.* v. *United States*, 296 U. S. 220, involving § 302 (g) of the Revenue Act of 1926, despite subsection (h) of that section which is the identical subsection which the appellee here contends shows that the amendment to Section 302 (c) should be applied retroactively. In that case the Court said (p. 221):

> "The case of *Lewellyn* v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918. This case arises under the act of 1926, § 302 (g), which is the same as § 402 (f) of the former act. Subdivision (h) of the 1926 act, however, provides that subdivisions (b), (c), (d), (e), (f), and (g) shall apply to 'transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.' Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable.

See *Wyeth* v. *Crooks,* 33 F. (2d) 1018, 1019. If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls."

In *Union Trust Co.* v. *Wardell,* 258 U. S. 537, the Court applied the rule of construction which we urge to a trust by the terms of which the decedent had reserved the income to himself for life with gifts over on his death. The language construed was Section 202 (b) of the Revenue Act of 1916, which read, "to the extent of any interest therein of which the decedent has *at any time* made a transfer" etc. The Court construed this language as not applying to a transfer made prior to the passage of the Act.

Among other cases in which Acts have been construed as not retroactive are the following: *Lynch* v. *Turrish,* 247 U. S. 221, 230; *Levy* v. *Wardell,* 258 U. S. 542; *Knox* v. *McElligott,* 258 U. S. 546; *Brewster* v. *Gage,* 280 U. S. 327, 337.

See also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.,* 266 U. S. 435.

In several cases the Board of Tax Appeals has construed the amendment made by the Joint Resolution of March 3, 1931 and Section 803 (a) of the Revenue Act of 1932 as applying only to transfers made subsequent to March 3, 1931. *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248; *Fidelity-Philadelphia Trust Co.* v. *Commissioner,* 34 B. T. A. 614; *Dahl* v. *Commissioner,* 35 B. T. A. 282.

(f) The language of the amendments does not require that they be construed as being retroactive.

Both the Joint Resolution of March 3, 1931, and Section 803 of the Revenue Act of 1932 include interests "of which the decedent has *at any time* made a transfer by trust or otherwise", etc. That the words italicised, "at any time", should not be construed to give the matter retroactive application is settled by the cases, including *Shwab* v. *Doyle,* 258 U. S. 529, and *Union Trust Company* v. *Wardell,* 258 U. S. 537, cited just above.

Subdivision (h) of Section 302 of the Revenue Act of 1926 does not necessarily require retroactive operation of the amendments to subdivision (c) of that section. This provision does not direct a general retroactive application of the estate tax. It directs that the particular, designated subdivisions shall apply retroactively. The subdivision (c) enacted by amendment in 1931 and 1932 was not the subdivision (c) thus referred to and thus designated to apply retroactively. The transfers subjected to the estate tax by the amendments were newly defined transfers, not subjected to the estate tax by subdivision (c) of the Revenue Act of 1926. Subdivision (h) above does not in terms require retroactive operation of any additions subsequently included by later amendments. The amendments do not by their own terms require retroactive operation, and they are new in substance.

Neither the Joint Resolution nor the Act of 1932 brought up to date or re-enacted subdivision (h) of Section 302 (c) of the Revenue Act of 1926. We submit that the mere fact that these amendments were enacted as amendments to the existing estate tax law (which

included subdivision (h)) does not necessarily require retroactive operation.

The question is—what did Congress intend? And its intention must be determined by a consideration of all the principles which are applicable to the construction of statutes. These principles, as we believe that we have demonstrated, require the construction for which we contend.

III.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

JOHN L. HALL,
CLAUDE R. BRANCH,
Counsel for Respondent.

HENRY HIXON MEYER,
EDWARD C. THAYER,
of Counsel.

February 1, 1938.

APPENDIX.

STATUTES AND REGULATIONS INVOLVED.

Statutes.

Section 302 of the Revenue Act of 1926 (44 Stat. 70-71) provided:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."
>
> . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g)

of this section shall apply to transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution (Pub. 131) (46 Stat. 1516), approved March 3, 1931, amended subsection (c) to read as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 803 of the Revenue Act of 1932 (47 Stat. 279; 26 U. S. C. § 411 (c)) provided:

"(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an ade-

quate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Regulations.

Internal Revenue Bulletin, Cumulative Bulletin X-1 pp. 450–451.

TRANSFERS BY DECEDENT IN HIS LIFETIME.

REGULATION 70 (1929), ARTICLES 17 AND 18: X-22-5086
General (transfers intended to take effect T. D. 4314
in possession or enjoyment at or after death).

Estate tax—Joint resolution of March 3, 1931.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S.,

238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long*, (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.*, v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury.

Internal Revenue Bulletin, Cumulative Bulletin XI-1, p. 329:

REGULATIONS 70 (1929), ARTICLE 18: Reservation of income or an annuity. XI-16-5455 T. D. 4336

ESTATE TAX—TRANSFERS

Article 18, Regulations 70 (1929 edition, as amended by Treasury Decision 4825 [C. B. IX-1, 356], amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

ART. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoy-

ment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.

OGDEN L. MILLS,
Secretary of the Treasury.

Treasury Regulations 80 (approved Nov. 7, 1934)

ART. 18. Transfers with possession or enjoyment retained. — *(a) Transfers included.* — The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedet subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 P. M., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 P. M., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 484

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES E. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE S. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1937
CERTIORARI GRANTED NOVEMBER 8, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 484

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances:
For Petitioner: James L. Banks, Jr., Esq.
For Respondent: Ralph F. Staubly, Esq., Frank T. Horner, Esq.

1935

Feb. 7—Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 7—Copy of petition served on General Counsel.
Apr. 6—Answer filed by General Counsel.
Apr. 11—Copy of answer served on taxpayer.
June 25—Motion for leave to amend answer filed by General Counsel—amendment tendered.
June 27—Motion for leave to amend answer granted.
2 July 3—Reply to amended answer filed by taxpayer.
July 13—Stipulation of facts filed.
July 18—Stipulation to submit case on pleadings and stipulation of facts; to set for oral argument and that parties be given privilege of filing briefs, filed.
July 20—Hearing set July 31, 1935.
July 31—Hearing had before Mr. Morris on merits—submitted. Briefs due 8/31/35—replies due Sept. 20, 1935.
Aug. 7—Transcript of hearing of July 31, 1935 filed.
Aug. 31—Brief filed by taxpayer.
Aug. 31—Brief filed by General Counsel.
Sept. 18—Reply brief filed by General Counsel.
Sept. 20—Reply brief filed by taxpayer. 9/20/35 copy served on General Counsel.,

1936

Oct. 20—Memorandum opinion rendered—Logan Morris, Division 14. Judgment will be entered for the petitioner.
Oct. 21—Decision entered—Division 14, Logan Morris.
3 1937
Jan. 13—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
Jan. 25—Proof of service filed by General Counsel (2).
Feb. 25—Praecipe with proof of service thereon filed by General Counsel—no counter praecipe will be filed

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "MT-ET-Cl-6296-3d New York, Estate of Josephine B. Marshall, Date of death—June 4, 1933", dated January 17, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is administrator of the Estate of Josephine B. Marshall, deceased, with office at 30 Broad Street, New York, N. Y. Letters of Administration upon said estate were granted to petitioner by the Surrogate's Court in and for the County of New York on March 12, 1934, as appears from the certificate hereto attached and marked "Exhibit A."

2. The notice of deficiency (a copy of which is attached and marked "Exhibit B")was mailed to the petitioner on January 17, 1935.

5 3. The taxes in controversy are estate taxes in respect of the above named decedent, who died on June 4, 1933, and for Forty thousand eight hundred fifty-eight and 34/100 Dollars, ($40,858.34).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The Commissioner erred in determining that the item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) representing the value as of the date of the decedent's death of securities transferred by the decedent to her son, Charles H. Marshall, in 1920, should be included in the decedent's gross estate, whereas the Commissioner should have determined that the said item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) should not have been included in decedent's gross estate.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. Decedent died intestate on June 4, 1933, in New York City, aged seventy-four years. The immediate cause of death was cancer, from which she had been suffering for about a year and a half prior to her death. Up to that time decedent had been in good health and possessed extraordinary vitality.

B. Decedent was the life beneficiary of certain trusts under
6 the will of her husband the late Charles H. Marshall of New York City, who died in 1912. The income from these trusts in 1920, the year in which decedent made the transfer hereinafter mentioned, was approximately Seventeen thousand five hundred Dollars ($17,500). At that time decedent also owned outright certain securities of a then value of approximately Four hundred twenty thousand Dollars ($420,000).

C. Following her husband's death, decedent had been in the habit of spending portions of each year in London but up to 1920 had never

been assessed for British income taxes. In November 1920, decedent, not in contemplation of death but actuated solely by her desire to reduce as much as possible her liability for British income taxes should she ever be assessed therefor as she subsequently was, transferred to petitioner the securities above referred to which she then owned outright. This transfer was evidenced by a bill of sale executed in London, England, on November 15, 1920, (Exhibit A to return) and shortly thereafter all of the shares of stock and registered bonds included in the securities transferred and standing in decedent's name were transferred to petitioner's name.

D. Simultaneously with the transfer above mentioned decedent entered into an agreement with petitioner (Exhibit B to return). This agreement provided that the securities transferred to petitioner and any reinvestments of such securities sold should be carried in a Special Account to be known as "Charles H. Marshall Special Account" or by some other similar name (paragraph II), that
7 petitioner should pay over to decedent such portion of the income from the securities as she should from time to time request (paragraph I), and that petitioner should bequeath the securities in the Special Account to decedent should she survive him (paragraph III). The agreement further provided that decedent would reimburse petitioner for the increased amount of any Federal or State income taxes payable by him as a result of the transfer (paragraph IV) and that should she survive petitioner she would pay his executors upon the transfer to her of the securities the amount of any Federal or State inheritance taxes resulting therefrom (paragraph V).

E. Prior to the transfer in 1920 decedent included the income from the securities transferred to petitioner in her own Federal income tax returns and paid the taxes due on such income. Ever since the transfer in 1920, petitioner has included the income derived from the Special Account in his Federal income tax returns and has paid the taxes due on such income. Inasmuch as petitioner's income, exclusive of his income from the Special Account, is substantial in amount, the result has been that since 1920 the Government has collected from petitioner considerably more in income taxes from the securities in the Special Account than it would have received on the same securities had decedent not transferred them.

F. During decedent's life petitioner from time to time paid to her or for her account, in accordance with paragraph I of the agreement of November 15, 1920, above mentioned, such portions
8 of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances, the only assessments having been in respect of income paid to decedent or for her account from the trusts under her husband's will above referred to.

G. Pursuant to the undertaking above referred to, contained in paragraph III of the agreement of November 15, 1920, petitioner executed a will early in December 1920, bequeathing to his mother

the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

Wherefore, the petitioner prays that the Board may hear the proceeding and find that the item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) should not be included in decedent's gross estate.

JAMES L. BANKS, JR.,
Counsel for Petitioner, Charles H. Marshall, as administrator, as aforesaid, No. 70 Pine Street, New York, N. Y.

9 [*Duly sworn to by Charles H. Marshall; jurat omitted in printing.*]

10 *Exhibit A to petition*

No. 393235

The People of the State of New York, to all to whom these presents shall come or may concern, send Greeting:

Know ye, that we, having inspected the Records of our Surrogate's Court, in and for the County of New York, do find that on the 12th day of March in the year one thousand nine hundred and thirty-four by said Court, Letters of Administration of the goods, chattels, and credits of Josephine B. Marshall, late of the County of New York, deceased, were granted unto

Charles H. Marshall of the County of New York, and that it does not appear by said Records that said Letters have been revoked.

In testimony whereof, we have caused the Seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon. James A. Foley, a Surrogate of our said County, in the City of New York, the 6th day of February in the year of our Lord one thousand nine hundred and thirty-five.

[SEAL] CHARLES P. SHERIDAN,
Clerk of the Surrogate's Court.

These letters authorize the collection of a total of $24,000. The collection in excess of that amount must be authorized by a further order of the Surrogate upon the filing of an additional bond.

[SEAL]

11 *Exhibit B to petition*

MT-ET-Cl-6296-3d New York.
Estate of Josephine B. Marshall.
Dated of death—June 4, 1933.

JAN. 17, 1935.

CHARLES H. MARSHALL, *Administrator,*
30 Broad Street, New York, New York.

SIR: A deficiency of $40,853.34 in the Federal estate tax liability of the above-named estate has been determined after a review of the

file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you asquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

12 The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) D. S. BLISS,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.

13 MT-ET-Cl-6296-3d New York

Estate of Josephine B. Marshall

The protest is made against the inclusion in the decedent's gross estate of a transfer of $468,115.07. Evidence at hand indicates that the decedent on November 4, 1920, entered into an agreement with Charles H. Marshall whereby the particular securities referred to in that agreement were transferred to a special account known as the Charles H. Marshall Special Account. The agreement provided that in the event the said Charles H. Marshall predeceased the decedent, the securities deposited in the special account should revert to her.

The question here involved is specifically covered by Article 17 of Regulations 80, and accordingly, no adjustment is warranted.

The tax liability of this estate is shown by the following computation which is hereby made final:

	Returned	Tentatively determined	Determined
Gross estate	$23,450.05	$491,565.12	$491,565.12
Deductions (1926 Act)	104,193.29	104,193.29	104,193.29
Net estate (1926 Act)	$ 0.00	$387,371.83	$387,371.83
Gross estate	$23,450.05	$491,565.12	$491,565.12
Deductions (1932 Act)	54,193.29	54,193.29	54,193.29
Net estate (1932 Act)	$ 0.00	$437,371.83	$437,371.83
Gross tax (1926 Act)	$ 0.00	$11,994.87	$11,994.87
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00	0.00
Net tax (1926 Act)	$ 0.00	$11,994.87	$11,994.87
14 Total gross taxes (1926 and 1932 Acts)	$ 0.00	$40,858.34	$40,858.34
Gross tax (1926 Act)	0.00	11,994.87	11,994.87
Net Additional tax	$ 0.00	$28,863.47	$28,863.47
Net tax (1926 Act)	0.00	11,994.87	11,994.87
Total net tax	$ 0.00	$40,858.34	$40,858.34
Deficiency			$40,858.34

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals $31,262.44 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations No. 80. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

15 Before United States Board of Tax Appeals

[Title omitted.]

Amended answer

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in amended answer to the petition of the above-named taxpayer, admits, denies, and avers as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are estate taxes in respect of the above-named decedent, who died on June 4, 1933, and denies all other allegations contained in said paragraph 3.

4. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph 4 of the petition.

5, A. Admits so much of subdivision A of paragraph 5 of
16 the petition as alleges that decedent died intestate on June 4, 1933, in New York City and denies all other allegations contained in said subdivision A, of paragraph 5 of the petition.

B, C, D, E, F, and G. Denies the allegations contained in subdivisions B to G, inclusive, of paragraph 5 of the petition.

6. Respondent avers that the value of the property transferred by the decedent to her son, Charles H. Marshall, petitioner herein, in 1920, pursuant to and for the purpose provided for in the written instruments executed between the decedent and her son under date of November 15, 1920, is subject to be included in the value of the decedent's estate pursuant to the provisions of subdivisions (a), (b), and/or (c) of Section 302 of the Revenue Act of 1926 as property of which the decedent died possessed and/or respecting which she made a transfer in contemplation of and/or intended to take effect in possession or enjoyment at or after her death.

7. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) Robert H. Jackson,
ROBERT H. JACKSON.
Assistant General Counsel for the Bureau of Internal Revenue.

Of counsel:

FRANK T. HORNER,
Special Attorney, Bureau of Internal Revenue.

RFS/nc.
6/24/35.

17 Before United States Board of Tax Appeals

[Title omitted.]

Reply

The above named petitioner for his reply to the amended answer of the Commissioner of Internal Revenue alleges as follows:

6. Replying to paragraph 6 of the amended answer, he admits that the property therein referred to was transferred by the decedent to her son, Charles H. Marshall, the petitioner, in 1920, by an instrument (Exhibit A to Return) executed by decedent on November 15, 1920, as set forth in subdivision (C) of paragraph 5 of the petition, but, except as so admitted, he denies each and every allegation of said paragraph 6. Further replying to said paragraph 6, petitioner alleges that the immediate, impelling, controlling and sole motive and purpose of the transfer was decedent's apprehension of

British income taxes and her desire to reduce her liability for such taxes should she ever be assessed therefor.

18 Wherefore, petitioner prays that the Board may hear the proceeding and find that the value of the transferred property involved in the assignment of error as set forth in paragraph 4 of the petition should not be included in decedent's gross estate.

JAMES L. BANKS, JR.,
Counsel for Petitioner.
CHARLES H. MARSHALL,
as Administrator,
No. 70 Pine Street,
New York, N. Y.

[*Duly sworn to by James L. Banks, Jr.; jurat omitted in printing.*]

20 Before United States Board of Tax Appeals

Title omitted.

Stipulation of facts

It is hereby stipulated by and between the above named petitioner, by his attorney, James L. Banks, Jr., and the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue, that the following facts are true and that the Board, subject to the exception hereinafter noted, may incorporate the same into its finding of facts, subject to the right of either party to introduce additional evidence not inconsistent herewith.

(1) The petitioner is administrator of the Estate of Josephine B. Marshall, deceased, who died intestate in New York City on June 4, 1933, aged 74 years, a citizen of the United States and a resident of New York City. Letters of administration upon decedent's estate were granted to petitioner by the Surrogate's Court of New York County on March 12, 1934, as appears from the certificate attached to the petition on the file with the Board.

21 (2) The notice of deficiency, a true copy of which is attached to the petition, was mailed on January 17, 1935. Said notice of deficiency proposed an assessment of estate taxes in the amount of $40,858.34.

(3) The deficiency proposed in the notice of deficiency rests upon the determination by the Commissioner of Internal Revenue that an item of $468,115.07, representing the value as of the date of decedent's death of certain securities, hereafter referred to, transferred by decedent to the petitioner in 1920, should be included in decedent's gross estate.

(4) The immediate cause of decedent's death was cancer, from which she had been suffering for about a year and a half prior to her death. Up to that time decedent had been in good health and possessed extraordinary vitality.

(5) Decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall of New York City, who died in 1912. The income from these trusts in 1920, the year in which decedent made the transfer hereinafter referred to, was approximately $17,500. At that time decedent also owned outright certain securities, hereafter referred to, of a then value of approximately $420,000.

(6) Following her husband's death, the decedent had been in the habit of spending portions of each year in London, but up to 1920 had never been assessed for British income taxes. In November 1920, decedent, not in apprehension or expectation of death, transferred to petitioner the securities above referred to. The immediate and an impelling motive for the transfer was decedent's apprehension of British income taxes, and her desire to reduce her liability for such taxes should she ever be assessed therefor, as she subsequently was assessed upon income from sources other than the property involved in the transaction under consideration. At the time of the transfer the matter of estate or inheritance taxes was not considered. The transfer was evidenced by a writing executed in London, England, on November 15, 1920, a copy of which is hereto annexed marked Exhibit A and made a part hereof. Shortly after the transfer all of the shares of stock and registered bonds included in the securities transferred and standing in decedent's name were transferred to petitioner's name.

(7) On the same day as the transfer above referred to, i. e., November 15, 1920, decedent entered into an agreement with petitioner with reference to the securities which she had just transferred to him. This agreement, a copy of which is hereto annexed marked Exhibit B and made a part hereof, provided that the securities transferred to petitioner and any reinvestments of such securities sold should be carried in a Special Account to be known as "Charles H. Marshall Special Account" or by some other similar name (paragraph II), that petitioner should pay over to decedent such portion of the income from the securities as she should from time to time request (paragraph I), and that petitioner should bequeath the securities in the Special Account to decedent should she survive him (paragraph III). The agreement further provided that decedent would reimburse petitioner for the increased amount of any Federal or State income taxes payable by him as a result of the transfer (paragraph IV) and that should she survive petitioner she would pay his executors upon the transfer to her of the securities the amount of any Federal or State inheritance taxes resulting therefrom (paragraph V).

(8) During decedent's life petitioner from time to time paid to her or for her account, in accordance with paragraph I of the agreement of November 15, 1920, above referred to, such portions of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances,

the only assessments having been in respect of income paid to decedent or for her account from the trusts under her hubsand's will above referred to.

(9) Pursuant to the undertaking above referred to, contained in paragraph III of the agreement of November 15, 1920, petitioner executed a will early in December 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes therein should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

(10) Prior to the transfer in 1920 decedent included the income from the securities transferred to petitioner in her own Federal
24 income tax returns and paid the taxes due on such income.

Ever since the transfer in 1920, petitioner has included the income derived from the Special Account in his Federal income tax returns and has paid the taxes due on such income. Inasmuch as petitioner's income, exclusive of his income from the Special Account, is substantial in amount, the result has been that since 1920 the government has collected from petitioner over $22,500 more in income taxes from the securities in the Special Account than it would have received on the same securities had decedent not transferred them. Copies of memoranda showing the excess income taxes so paid are hereto annexed marked Exhibits C and D and made a part hereof. Exhibit C, prepared by Messrs. Boyce, Hughes, and Farrell, Certified Public Accountants, of 110 William Street, New York City, relates to the years 1924 to 1929, inclusive, 1932 and 1933, for which years that firm had charge of income tax matters for decedent and petitioner. Exhibit D, prepared by petitioner relates to the years 1921, 1922, 1923, 1930, and 1931.

Respondent objects to the facts recited in the foregoing paragraph (10) being received or considered as evidence herein on the grounds that such facts are irrelevant and immaterial, and in the event this objection be overruled, respondent requests that an exception be noted of record.

JAMES L. BANKS, Jr.,
Counsel for Petitioner.
ROBERT H. JACKSON,
Ass. General Counsel,
Bureau of Internal Revenue.

25 *Exhibit A*

Know all men by these presents, that I, Josephine Banks Marshall, residing at No. 19 Hill Street, Berkeley Square, London, England, party of the first part, for and in consideration of the sum of One Dollar ($1.00), lawful money of the United States, to me in hand paid at or before the ensealing and delivery of these presents, by Charles H. Marshall, residing at Mendham, New Jersey, party of the second part, the receipt whereof is hereby acknowledged, have bar-

gained and sold, and by these presents do grant and convey unto the said party of the second part, his executors, administrators, and assigns, all the securities and cash described in the Schedule hereunto annexed and made a part of this instrument.

To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns forever. And I do for my heirs, executors, and administrators, covenant and agree to and with the said party of the second part to warrant and defend the sale of the said securities and cash hereby sold unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons whomsoever.

In witness whereof, I have hereunto set my hand and affixed my seal this 15th day of November, One thousand nine hundred and twenty.

Signed, sealed, and delivered.

[SEAL] (sd) JOSEPHINE BANKS MARSHALL.

In the presence of:

(sd) ELIOT B. COULTER.

26 LONDON,
ENGLAND,

Consulate of the United States of America, London, England:

Be it known that on the 15th day of November 1920, before me, a Vice-Consul of the United States of America, duly commissioned and sworn, residing in the City of London, England, personally came and appeared Josephine Banks Marshall, to me known and known to me to be the person described in and who executed the foregoing instrument, and she acknowledged the said instrument to be her act and deed, and that she executed the same.

In testimony whereof, I have hereunto signed my name and affixed my seal of office the day and year last above written.

[SEAL] (sd) ELIOT B. COULTER,
Vice-Consul of the United States of America at London, England.

#12389.
($2.00 stamp cancelled.)

Schedule of Securities Owned by Josephine Banks Marshall

BONDS

27 $10,000 Interborough Rapid Transit Company, First and Refunding 5s, dated January 1, 1913, due January 1, 1966. Certificates Nos. 83321 to 83328, inclusive, 131221 and 131222. (Registered.)

$15,000 Northern Pacific-Great Northern (C. B. & Q.), Joint Collateral Trust 4s, dated July 1, 1901, due July 1, 1921, Certificates Nos. 77017 to 77024, inclusive, 77032 to 77034, inclusive, 80116, 80117, 141062, and 141063. (Coupon.)

$10,000 Lackawanna Steel Company, First Mortgage Gold 5s, dated April 1, 1903, due April 1, 1923, Certificates Nos. 7805 to 7814, inclusive. (Coupon.)

$9,000 New York Central & Hudson River Railroad Company, Refunding and Improvement 4½s, Series "A", dated October 1, 1913, due October 1, 2013. Certificates Nos. 19219, 19220, 19221, 33780, 34724 to 34728, inclusive. (Registered.)

$5,000 United States Steel Corporation, 10–60 Year Sinking Fund Gold 5s, dated April 1, 1903, due April 1, 1963. Certificates Nos. 94438, 106544, 108367, 108368, and 155246. (Coupon.)

$850 Second Liberty Loan, Convertible 4¼s, 1927-1942. Certificates Nos. C–00019578 for $50, C–01915403, D–01915404, and E–1015405 for $100 each, and E–00276990 for $500. (Coupon.)

28 $750 Third Liberty Loan, 4¼s, 1928. Certificates Nos. 5143728 for $50, 1270305 and 1270306 for $100 each, and 88759 for $500. (Coupon.)

$2,200 Fourth Liberty Loan, 4¼s, 1933–1938. Certificates Nos. 541638 and 541639 for $100 each, and 43652 and 43653 for $1,000 each. (Temporary coupon bonds.)

$500 Victory Liberty Loan, 4¾s 1922–1923. Certificate No. K–1100207. (Temporary Coupon Bond.)

$3,000 Consolidated Gas Company of New York, Five Year Convertible Gold 7s, dated February 1, 1920, due February 1, 1925. Certificates Nos. M–2736 to M–2738, inclusive. (Coupon.)

$5,000 Columbia Graphophone Manufacturing Company, Five Year 8% Gold Notes, dated August 1, 1920, due August 1, 1925, Trust Receipts Nos. 1221 to 1225, inclusive.

$9,000 French Republic 8s, due September 1, 1945. Temporary Certificates Nos. M–31828, 31830, 31834 to 31840, inclusive.

$5,000 Anaconda Copper Mining Company, Secured Gold 7s, Series "B", dated January 1, 1919, due January 1, 1929.

STOCKS

29 125 shares National Bank of Commerce, capital stock, Certificates Nos. A–5744 for 25 shares and 5915 for 100 shares.

50 shares United States Steel Corporation, preferred stock. Certificate No. C-268428.

200 shares Pennsylvania Railroad Company, capital stock, Certificates Nos. A-659443 and A-659444 for 100 shares each.

50 shares American Telegraph & Cable Company, capital stock. Certificate No. 4432.

100 shares Baltimore & Ohio Railroad Company, preferred stock. Certificate No. 13365.

300 shares Reading Company, First preferred stock. Certificates Nos. C7318 to C7320 inclusive.
71 shares Delaware & Hudson Company, capital stock, Certificates Nos. 27879 for 21 shares, 20147 for 22 shares and 44015 for 28 shares.
300 shares Southern Railway Company, preferred stock. Certificates Nos. F-9654 to F-9656, inclusive.
100 shares American Exchange National Bank, capital stock. Certificate No. 16.
40 shares American Exchange Securities Corporation, capital stock. Certificate No. O-1003.
30 122 shares Alabama Mineral Land Company, capital stock. Certificate No. 1231.
370 shares Central & South American Telegraph Company, capital stock. Certificates Nos. 4419, 4480, and 4481 for 100 shares each, and A-11124 for 70 shares.
21 shares Fidelity Phoenix Fire Insurance Company, capital stock. Certificate No. F-835.
40 shares Northern Trust Company of Superior, Wisconsin, capital stock. Certificate No. 187.

Stocks, the certificates for which are in my Account in Butler, Herrick & Marshall, 7 Wall Street, New York City, but not in my name.

100 shares Standard Oil Company of New Jersey, preferred stock.
100 shares Hodgman Rubber Company, preferred stock.
100 shares Allis-Chalmers Manufacturing Company, preferred stock.
40 shares Alabama Mineral Land Company, capital stock.
100 shares International Motor Truck Corporation, First preferred stock.
31 100 shares Lucey Manufacturing Corporation, Class A stock.
100 shares American Chicle Company, common stock.
All cash—In my account in Butler, Herrick & Marshall, amounting on November 4, 1920, to $17,363.40.

BONDS AND MORTGAGES

$21,000 B/M Albert & Lena Rosenblatt, dated June 29, 1911. Premises 136 West 117th Street, New York City. Recorded July 8, 1911, N. Y. Co. Reg. Office, Liber 294, Sec. 7, page 400 of Mortgages, Block No. 1901. Reduced to $16,000.
$20,000 B/M Isaac and Lena Wasserzug, dated February 28, 1911. Premises 12 West 113th Street, New York City. Recorded March 1, 1911, N. Y. Co. Reg. Office, Liber 274, Sec. 6, page 285 of Mortgages, Block No. 1596. Reduced to $16,800.
$20,000 B/M The Murray Estate, dated March 2, 1911. Premises 151 West 102nd Street, New York City. Recorded March 2, 1911, N. Y. Co. Reg. Office, Liber 290, page 485 of Mortgages, Block 1857. Reduced to $18,000.

$25,000 B/M Clara Straus to Frederick de P. Foster, dated
32 December 21, 1905. Premises 340 St. Nicholas Avenue, New York City. Recorded December 21, 1905, N. Y. Co. Reg. Office, Liber 199, Sec. 7, page 360 of Mortgages, Block No. 1954. Assignment, dated December 21, 1905. Reduced to $20,000.

$55,000 B/M Max Schulhof, dated April 29, 1910. Premises 226 West 108th Street, New York City. Recorded April 30, 1910, N. Y. Co. Reg. Office, Liber 280, Sec. 7, page 298 of Mortgages, Block No. 1879. Reduced to $46,500.

$26,000 B/M Adolph and Bertha Scheibel to Frederic de P. Foster, dated November 24, 1908. Premises 111 West 96th Street, New York City. Recorded November 24, 1908, N. Y. Co. Reg. Office, Liber 258, Sec. 7, page 179 of Mortgages, Block No. 1851. Assignment of $11,000 interest, dated November 24, 1908; reduced to $10,300.

33 *Exhibit B*

Agreement, made this 4th day of November 1920, between Josephine Banks Marshall, residing at 19 Hill Street, Berkeley Square, London, England, party of the first, and Charles H. Marshall, residing at Mendham, New Jersey, party of the second part, witnesseth:

Whereas, the party of the first part, by an instrument in writing, dated the 4th day of November 1920, has conveyed unto the party of the second part, the securities and cash described in the Schedule hereunto annexed and made a part hereof;

And whereas, it is the understanding of the parties of the first and second part, that in the event of the death of the party of the second part during the lifetime of the party of the first part, the said securities and cash described in the annexed Schedule or other securities of equal value shall be reconveyed to the party of the first part;

Now, therefore, in consideration of the premises and of the sum of One ($1.00) Dollar, lawful money of the United States, by each party to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and promises herein contained, it is hereby agreed as follows:

I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

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II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in

the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive
35 the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the above mentioned "Charles H. Marshall, Special Account," the amount of any State and Federal inheritance taxes due by virtue of such transfer.

VI. This agreement shall be binding upon the heirs, executors, administrators and assigns of both parties hereto.

In witness whereof the parties have hereunto set their hands and affixed their seals as of the day and year first above written.

(SD) JOSEPHINE BANKS MARSHALL.

As to Josephine Banks Marshall, in the presence of

(SD) R. E. LUGAR.

(SD) CHARLES H. MARSHALL.

As to Charles H. Marshall.

(sd) H. L. MARTIN as to CHM.

LONDON, ENGLAND,

Consulate of the United States of America, London, England:

Be it known that on the 15th day of November 1920, before
36 me, a Vice-Consul of the United States of America, duly commissioned and sworn, residing in the City of London, England, personally came and appeared Josephine Banks Marshall, to me known and known to me to be one of the persons described in and who executed the foregoing instrument, and she acknowledged the said instrument to be her act and deed, and that she executed the same.

In testimony whereof, I have hereunto signed my name and affixed my seal of office the day and year last above written.

(SD) ELIOT B. COULTER,
Vice Consul of the United States of America at London, England.

#12388.

($2. stamp cancelled.)

STATE OF NEW YORK,
County of New York, ss:

On the 4th day of November 1920, before me came Charles H. Marshall, to me known and known to me to be one of the individuals described in, and who executed, the foregoing instrument, and acknowledge to me that he executed the same.

(SD) EDWIN G. COLWELL,
Notary Public.

New York County No. 2. New York Register No. 2183. Commission Expires Mar. 30, 1922.

37 Schedule of Securities Owned by Josephine Banks Marshall

BONDS

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$15,000 Northern Pacific-Great Northern (C. B. & Q.), Joint Collateral Trust 4s, dated July 1, 1901, due July 1, 1921. Certificates Nos. 77017 to 77024, inclusive, 77032 to 77034, inclusive, 80116, 80117, 141062 and 141063. (Coupon.)

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200 shares Pennsylvania Railroad Company capital stock. Certificates Nos. A–659443 and A–659444 for 100 shares each.

50 shares American Telegraph & Cable Company, capital stock. Certificate No. 4432.

100 shares Baltimore & Ohio Railroad Company, preferred stock. Certificate No. 13365.

300 shares Reading Company, First preferred stock. Certificates Nos. C–7318 to C–7320, inclusive.

71 shares Delaware & Hudson Company, capital stock. Certificates Nos. 27879 for 21 shares, 20147 for 22 shares and 44015 for 28 shares.

300 shares Southern Railway Company, preferred stock. Certificates Nos. F–9654 to F–9656, inclusive.

40 100 shares American Exchange National Bank, capital stock. Certificate No. 16.

40 shares American Exchange Securities Corporation, capital stock. Certificate No. O–1003.

122 shares Alabama Mineral Land Company, capital stock. Certificate No. 1231.

370 shares Central & South American Telegraph Company, capital stock. Certificates Nos. 4419, 4480, and 4481 for 100 shares each, and A–11124 for 70 shares.

21 shares Fidelity Phoenix Fire Insurance Company, capital stock. Certificate No. F–835.

40 shares Northern Trust Company of Superior, Wisconsin, capital stock. Certificate No. 187.

Stocks, the certificates for which are in my Account in Butler, Herrick & Marshall, 7 Wall Street, New York City, but not in my name.

100 shares Standard Oil Company of New Jersey, preferred stock.
100 shares Hodgman Rubber Company, preferred stock.
100 shares Allis-Chalmers Manufacturing Company, preferred stock.
41 40 shares Alabama Mineral Land Company, capital stock.
100 shares International Motor Truck Corporation, First preferred stock.
100 shares Lucey Manufacturing Corporation, Class A stock.
100 shares American Chicle Company, common stock.
All cash—In my account in Butler, Herrick & Marshall, amounting on November 4, 1920, to $17,363.40.

BONDS AND MORTGAGES

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$20,000 B/M Isaac and Lena Wasserzug, dated February 28, 1911. Premises 12 West 113th Street, New York City. Recorded March 1, 1911, N. Y. Co. Reg. Office, Liber 274, Sec. 6, page 285 of Mortgages, Block No. 1596. Reduced to $16,800.

$20,000 B/M The Murray Estate, dated March 2, 1911. Premises 151 West 102nd Street, New York City. Recorded March 2, 1911, N. Y. Co. Reg. Office, Liber 290, page 485 of Mortgages, Block 1857. Reduced to $18,000.
42

$25,000 B/M Clara Straus to Frederick de P. Foster, dated December 21, 1905. Premises 340 St. Nicholas Avenue, New York City. Recorded December 21, 1905, N. Y. Co. Reg. Office, Liber 199, Sec. 7, page 360 of Mortgages. Block No. 1954. Assignment, dated December 21, 1905. Reduced to $20,000.

$55,000 B/M Max Schulhof, dated April 29, 1910. Premises 226 West 108th Street, New York City. Recorded April 30, 1910, N. Y. Co. Reg. Office, Liber 280, Sec. 7, page 298 of Mortgages, Block No. 1879. Reduced to $46,500.

$26,000 B/M Adolph and Bertha Scheibel to Frederic de P. Foster, dated November 24, 1908. Premises 111 West 96th Street, New York City. Recorded November 24, 1908, N. Y. Co. Reg. Office, Liber 258, Sec. 7, page 179 of Mortgages, Block No. 1851. Assignment of $11,000 interest, dated November 24, 1908; reduced to $10,300.

43 *Exhibit C*

Prepared by Boyce, Hughes & Farrell, 110 William Street, New York, N. Y.

Federal income taxes

	Including special account in Charles H. Marshall return			Had special account been included with Josephine B. Marshall return instead of Charles H. Marshall return			
	Charles H. Marshall paid	Josephine B. Marshall paid	Actual payments, total	Charles H. Marshall would have paid—	Josephine B. Marshall would have paid—	On this basis the total would be—	Actual payments were greater by—
1924	$9,221.44	$140.35	$9,361.79	$3,681.19	$3,192.75	$6,793.94	$2,667.85
1925	14,431.44	165.27	14,596.71	5,578.62	5,311.95	11,889.97	3,306.74
1926	13,281.12	293.40	13,574.52	6,531.57	5,770.59	12,302.76	1,271.76
1927	17,392.41	109.94	17,502.35	8,254.69	5,698.76	13,953.45	4,158.80
1928	29,762.94	265.88	30,028.82	21,757.10	4,438.77	26,195.87	3,811.95
1929	30,541.98	144.38	30,686.36	33,944.39	2,511.89	36,456.79	5,770.43
1930							
1931							
1932		536.67	536.67		53.35	53.35	A 483.33
1933	8,556.40	143.15	8,699.55	5,677.00	B 53.52 483.69	6,228.61	2,472.94
	$122,787.73	$1,780.04	$134,567.77	$95,873.47	$37,312.58	$113,187.05	$21,380.72

A—Excess paid by Josephine B. Marshall.
B—Estate of Josephine B. Marshall.

45

Exhibit D

Prepared by Charles H. Marshall, 30 Broad Street, New York, N. Y.

	Including special account in Charles H. Marshall return			Had special account been included with Josephine B. Marshall return instead of Charles H. Marshall return			
	Charles H. Marshall paid	Josephine B. Marshall paid	Actual payments	Charles H. Marshall would have paid—	Josephine B. Marshall would have paid—	On this basis the total would be—	Actual were were greater by—
1921	$2,955.77	$685.97	$3,641.74	$2,419.44	$1,185.25	$3,554.69	$87.05
1922	3,239.87	539.36	3,779.23	2,157.73	944.99	3,102.72	676.51
1923	3,181.48	551.97	3,733.45	618.50	2,880.72	3,499.22	294.23
1930		165.27	165.27				165.27
1931				616.89		616.89	
	$9,377.12	$1,932.57	$11,309.69	$5,812.56	$4,999.96	$10,773.52	$1,183.06

46 Before United States Board of Tax Appeals

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

James L. Banks, Jr., Esq., for the petitioner.
Ralph F. Staubly, Esq., and
Frank T. Horner, Esq., for the respondent.

Memorandum opinion

MORRIS: The respondent having determined a deficiency in estate tax $40,858.34, the petitioner institutes this proceeding for its redetermination, alleging error by reason of the inclusion in the decedent's gross estate of $468,115.07, representing the value, as of the date of the decedent's death, of securities transferred by her to her son, Charles H. Marshall, in 1920.

The respondent affirmatively alleges that the value of such property is includable in the decedent's gross estate under subdivisions (a), (b), and (c) of section 302 of the Revenue Act of 1926, as property of which the decedent died possessed and respecting which she made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after her death. The petitioner's reply denies this matter, alleging that the immediate, impelling, con-
47 trolling, and sole motive and purpose of the transfer was the decedent's apprehension of British income taxes and her desire to reduce her liability for such taxes, should she ever be assessed therefor.

The petitioner is the duly appointed and acting administrator of the Estate of Josephine B. Marshall, deceased, who died, intestate, in the City of New York June 4, 1933, at the age of 74, while then a citizen of the United States and a resident of New York City. The immediate cause of her death was cancer, from which she had suffered for about a year and a half prior to her death. Up to this period of illness, however, she had been in good health and possessed extraordinary vitality.

Decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall, of New York City, who died in 1912. The income from these trusts in 1920—the year in which decedent made the transfer hereinafter referred to—was approximately $17,500. At that time she also owned certain securities outright, hereafter referred to, having a value then of approximately $420,000.

Following her husband's death, the decedent had habitually spent portions of each year in London, but up to 1920 had never been assessed for British income taxes. By instrument dated November 15, 1920, executed in London, England, on that date, she, not in apprehension or expectation of death, transferred to this petitioner certain stocks, bonds, cash and other securities listed in a scedule appended to such instrument. The immediate and an impelling notice for such transfer was her apprehension of British income taxes, and her de-
sire to reduce her liability for such taxes should she be
48 assessed therefor, as she subsequently was upon income from sources other than the property involved in the transaction under consideration. At the time of the transfer the matter of estate or inheritance taxes was not considered. Shortly after the transfer all of the shares of stock and registered bonds included in the

securities transferred and standing in decedent's name were transferred to petitioner's name.

On the same date aforesaid, i. e., November 15, 1920, the decedent entered into another agreement with the petitioner with reference to the same securities which she had just transferred to him in which—after reciting "the understanding of the parties of the first and second part (decedent and petitioner, respectively), that in the event of the death of the party of the second part during the lifetime of the party of the first part, the said securities and cash described in the annexed Schedule or other securities of equal value shall be reconveyed to the party of the first part"—it was agreed as follows:

I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

49 II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above-mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the above-mentioned "Charles H. Marshall, Special Account," the amount of any State and Federal inheritance taxes due by virtue of such transfer.

50 VI. This agreement shall be binding upon the heirs, executors, administrators, and assigns of both parties hereto.

During decedent's life, petitioner, from time to time, paid to her or for her account, in accordance with paragraph I above, such portions of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances, the only assessments having been in respect of income

paid to decedent or for her account from the trusts under her husband's will above referred to.

Pursuant to paragraph III of the agreement above, petitioner executed a will early in December 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

Prior to the transfer in 1920, decedent included the income from the securities transferred to petitioner in her own Federal income tax returns and paid the tax due thereon. Since the transfer the petitioner has included the income derived from the Special Account in his returns and has paid the tax due thereon.

The parties stipulated certain facts subject to the ruling of the Board upon objection by the respondent that such facts were irrelevant and immaterial. Agreeing with the respondent that such facts are irrelevant to the question of law presented, we have excluded them from our finding.

51 The respondent contends and so alleges, that the value of the securities was properly included in the gross estate under the provisions of section 302 of the Revenue Act of 1926, either as property transferred in contemplation of death or as a transfer intended to take effect in possession or enjoyment at or after death. The amendments to this section of March 3, 1931, and by section 803 (a) of the Revenue Act of 1932 are not retroactive, consequently they have no bearing here. Flora M. Bonney et al., 29 B. T. A. 45, affirmed 75 Fed. (2) 1008, 15 A. F. T. R. 360.

We quite agree with the respondent that the state of health of the grantor at the time of the transfer is not determinative of the motive which impelled the transfer, but we cannot agree that merely the because the grantor retains one, not "all", of the attributes of ownership until death, and merely because she makes provision for the ultimate distribution thereof "by reference to death" that a transfer is in contemplation of death within the meaning of the statute. However, we need not, under the facts, dwell upon the subject at length. The decedent died of cancer in 1933. That was approximately thirteen years after the transfer. She only suffered with the disease about a year and a half prior to death. Prior to her illness she had been in good health. So that poor health is not a factor in our determination. It is stipulated that "The immediate and an impelling motive for the transfer was decedent's apprehension of British income taxes," a motive intimately associated with life, not death. Although there may have been other motives, the record does not disclose them. We are of the opinion that the record fails to

52 support, in the slightest degree, the allegation that the transfer in question was made by the decedent in contemplation of death. United States v. Wells et al., Executors, 283 U. S. 102, 9 A. F. T. R. 1440; B. Paul Mossman, Executor, 32 B. T. A. 596; Marie E. Harnischfeger et al., Executors, 31 B. T. A. 224.

Our further question is whether the transfer, in 1920—reading the two instruments together, that is, the instrument of transfer itself and the instrument providing for a reversion to the donor in the event the donee should predecease her, etc.—coupled, as it was, with an arrangement (1) by which enjoyment of the income was reserved to the donor for life and with the further arrangement (2) by which title should revert to her if she survived the grantee, was intended to take effect in possession or enjoyment at or after death, within the meaning of said section 302.

In substance, the instant case is no different from Helvering v. St. Louis Union Trust Company et al., 296 U. S. 39, 16 A. F. T. R. 985, and Becker v. St. Louis Union Trust Company et al., 296 U. S. 48, 16 A. F. T. R. 989. In the former case the decedent, who died in 1925, in 1920 created a trust in certain securities, the net income therefrom to be paid to a daughter during her life. The trustee was clothed with discretionary power to terminate the trust when, in his wisdom it should be done, the estate in such event reverting to the grantor. It was also provided that if the daughter should predecease the grantor, the trust should terminate and the estate revert to the grantor. At the death of the grantor neither of such contingencies had occurred. The respondent contended there, as he does here, that the grantor, having reserver the right to revest in
53 himself the trust property upon the happening of such contingencies, the transfer was only intended to take effect in possession or enjoyment at or after death, within the meaning of section 302 of the act. The court sustained the petitioner, thereby affirming the decision of the Circuit Court which had affirmed the Board (28 B. T. A. 107) saying:

"* * * The grantor here, by the trust instrument, left in himself no power to resume ownership, possession, or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely forthitous so far as any control, design, or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a
54 termination by the trustee of the trust during the lifetime of of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possi-

bility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility.

"It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place."

In the latter case the decedent who died in 1928, in 1921, executed certain trust declarations in favor of his children conveying, in trust, certain securities, by which it was provided, among other things, that if the beneficiaries should die before his death, the estate should revert to him and that in the event of his death the property should become the beneficiaries'. The court merely followed its decision in Helvering v. St. Louis Union Trust Company, supra, saying:

"* * * By the declaration of trust here under review, the legal title, possession, and control of the trust estate passed irrevocably from the grantor as an individual to himself as trustee. The
55 effect is no different than if the trustee had been another person. Cf. Reinecke v. Trust Co., 278 U. S. 339, 346. By the final paragraph of the declaration, quoted above, the grantor does not retain any interest in the property, but, recognizing the completeness of the transfer, he provides that the property shall revert to him in case the beneficiary shall predecease him. The provision that the trust estate shall 'revert' in case of the predecease of the beneficiary removes any doubt as to the completeness of the transfer, if otherwise there would be any. The question, therefore, is whether the mere possibility of a reverter stamps the transfer as one intended to take effect in possession or enjoyment at or after the death of the grantor. The decision just rendered answers this question in the negative."

Therefore, under those decisions the grant was as complete in 1920 as it was possible to make it, in so far as the decedent was concerned. The contingency by which there may have been a possible reversion to her and which depended not upon any power retained in the decedent as grantor but upon the subsequent event of the death of the grantee, had not occurred prior to the death of the decedent. Her death merely made it impossible for the reversion—it extended no greater property right in the corpus of the estate than had already been granted in 1920. Nor does the fact that she retained the right to receive the income from the corpus during her lifetime alter this conclusion. May v. Heiner, 281 U. S. 238, 8 A. F. T. R. 10, 904.

Judgment will be entered for the petitioner.

Entered Oct. 20, 1936.

[SEAL]

56 Before United States Board of Tax Appeals, Washington

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered October 20, 1936, it is

Ordered and Decided: That there is no deficiency in estate tax.

Enter:

[SEAL] (Signed) LOGAN MORRIS, *Member.*

Entered Oct. 21, 1936.

57 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Frank T. Horner and Ralph F. Staubly, Special Attorneys, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue
58 of the laws of the United States; that Charles H. Marshall of New York City is the duly appointed, qualified and acting administrator of the Estate of Josephine B. Marshall, deceased; that the local address of said administrator is 30 Broad Street, New York City, New York; and that the Federal estate tax return, Form 706, executed on behalf of the decedent's estate, was filed with the Collector of Internal Revenue for the Third District of New York, whose office is located in New York City, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

That the Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit:

The decedent, Josephine B. Marshall, died intestate on June 4, 1933, a resident of New York City, State of New York. The Federal estate tax return filed on behalf of the decedent's estate disclosed no tax liability.

On November 15, 1920, the decedent executed a certain instrument of transfer whereby she transferred certain securities of the approximate value of $420,000.00 to Charles H. Marshall, respondent on review, at the same time the decedent and said Charles H. Marshall entered into an agreement with respect to such securities, pursuant to which the securities were to be held by the said Charles H.
59 Marshall in a special account during the lifetime of the decedent, the income therefrom to be paid to the decedent, with the further provision that in the event of the death of the said Charles H. Marshall during the lifetime of the decedent, the said securities should be reconveyed to the decedent.

Under date of January 17, 1935, the Commissioner of Internal Revenue mailed a notice to the administrator aforesaid, asserting a deficiency in the estate tax on the transfer of the decedent's net estate, in the amount of $40,858.34. In determining the deficiency in the tax, the Commissioner included the value of said securities aforesaid in the decedent's gross estate, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1926 as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death.

Under the pleadings in this case the Commissioner, also, asserted and contended, and so alleged, that said securities aforesaid were subject to be retained in the decedent's gross estate for the purpose of the tax, pursuant to the provisions of Section 302 (a) and Section 302 (c) of said Act, as property of the decedent at the date of her death, and as property transferred in contemplation of death.

On July 3, 1935, the respondent on review filed an appeal with the United States Board of Tax Appeals from the Commissioner's determination of the deficiency as set forth in the deficiency notice aforesaid. After the answer of the Commissioner was duly filed, the case was submitted to the Board of Tax Appeals for de-
60 cision upon the pleadings and a stipulation of facts. The memorandum opinion and interlocutory decision of the Board of Tax Appeals was entered October 20, 1936, and the final order of the Board redetermining the deficiency was entered on October 21, 1936, in which it was ordered and decided that there was no deficiency in the estate tax due from the decedent's estate.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the decision of the Board of Tax Ap-

peals, and by its order redetermining the deficiency in the tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the decedent, through the medium of the instruments of transfer, executed and delivered by her under date of November 15, 1920, then made a complete disposition of the property which was the subject of such instruments of transfer, there being no evidence to support such finding of fact.

(2) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the decedent upon the execution and
61 delivery of the instruments of transfer aforesaid did not then make a complete disposition of her right, title, interest, or estate in and to the property constituting the subject of said instrument of transfer.

(3) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the transfer effected through the medium of the instruments of transfer aforesaid was not intended to take effect in possession or enjoyment at or after the decedent's death, there being no evidence to support such finding of fact.

(4) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the aforesaid disposition effected through the medium of transfer aforesaid, was intended to take effect in possession or enjoyment at or after the decedent's death.

(5) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the disposition effected through the medium of the instruments of transfer executed on November 15, 1920, as aforesaid, was not made in contemplation of death, there being no evidence to support such finding of fact.

(6) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the disposition effected through the medium of the instruments of transfer aforesaid was made in contemplation of death.

62 (7) The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in the estate tax, instead of a deficiency of $40,858.34, as set forth in the notice of deficiency.

(8) The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is due from the decedent's estate a deficiency in the estate tax in the sum of $40,858.34, as set forth in the deficiency notice, instead of deciding that there is no deficiency in the tax.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing,

and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) ROBERT H. JACKSON,
Assistant Attorney General.
(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Of counsel:
FRANK T. HORNER,
RALPH F. STAUBLY,
Special Attorneys, Bureau of Internal Revenue.

63 [*Duly sworn to by Ralph F. Staubly; jurat omitted in printing.*]

64 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To CHARLES H. MARSHALL,
30 Broad Street, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

65 Dated this 13th day of January, 1937.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this day of January 1937.

(Sgd.) CHARLES H. MARSHALL,
Respondent on Review.

RFS/rb 1/6/37.

66 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To JAMES L. BANKS, Jr.,
70 Pine Street, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

67 Dated this 13th day of January 1937.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 14th day of January, 1937.

(Sgd.) JAMES L. BANKS, JR.,
Counsel for Respondent on Review.

RFS/rb 1/6/37.

68 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Praecipe for record

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:

69 (a) Petition, including annexed copy of the deficiency notice.
(b) Amended answer filed June 25, 1935.
(c) Reply filed July 3, 1935.

3. Opinion (memorandum), and decision of the Board.
4. Petition for review, together with proof of service of notice of filing, and of service of a copy of petition for review.
5. Stipulation of facts.
6. This praecipe.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 23rd day of February 1937.

JAMES L. BANKS, JR.,
Attorney for Respondent on Review.

No Counter Praecipe will be filed. James L. Banks, Jr.
RFS/rb 1/26/37.

70 [Clerk's certificate to foregoing transcript omitted in printing.]

71 In United States Circuit Court of Appeals for the Second Circuit

No. 403. October Term, 1936

Argued June 9, 1937. Decided June 28, 1937

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, RESPONDENT

Appeal from the Board of Tax Appeals

Before MANTON, SWAN, and CHASE, Circuit Judges

Petition to review the decision of the United States Board of Tax Appeals.

James W. Morris, Asst. Atty. Gen., and Sewall Key, J. Louis Monarch, and John G. Remey, Sp. Assts. to the Atty. Gen., for petitioner.

James L. Banks, Jr., of New York City, for respondent.

Opinion

Per Curiam.

Decision affirmed on the authority of Welch v. Hassett, 90 F. (2d) 833, decided June 1, 1937 (C. C. A. 1), and Bullard v. Commissioner, 90 F. (2d) 144, decided May 25, 1937 (C. C. A. 7).

72 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES H. MARSHALL, ADMNR., ETC., RESPONDENT

Judgment

Filed July 6, 1937

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

73 [File endorsement omitted.]

74 [Clerk's certificate to foregoing transcript omitted in printing.]

75 Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for hearing immediately following Nos. 349 and 375.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 41,965. U. S. Circuit Court of Appeals, Second Circuit. Term No. 484. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Charles H. Marshall, Administrator of the Estate of Josephine B. Marshall, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed October 6, 1937. Term No. 484 O. T. 1937.

29487—37——3

U. S. GOVERNMENT PRINTING OFFICE: 1937

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CITATIONS

Cases:

Bullard v. *Commissioner*, 90 F. (2d) 144, now pending before this Court, No. 349, October Term, 1937 — 7

Welch v. *Hassett*, 90 F. (2d) 833, now pending before this Court, No. 375, October Term, 1937 — 7

Statues:

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 302(c) as amended (U. S. C., Title 26, Sec. 411(c)) — 9, 10

Sec. 302(h) — 9

Miscellaneous:

Treasury Regulations 80 (1934 Ed.):

Article 18 — 11

19415—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on July 6, 1937, affirming the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 46–55) is not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 71) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1937. (R. 71.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, should be construed to apply to transfers made prior to the dates of the passage of the amendments, and, if so applied, whether it violates the Constitution.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 9–11.

STATEMENT

The material facts as stipulated (R. 20–45) and as found by the Board of Tax Appeals (R. 46–50) are substantially as follows:

Josephine B. Marshall died, intestate, June 4, 1933, a citizen of the United States and a resident of New York. Respondent is the administrator of her estate. (R. 47.)

The decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall, of New York City, who died in 1912. The income from these trusts in 1920, the

year in which she made the transfer hereinafter referred to, was approximately $17,500. Besides her interest in this trust fund she owned certain securities outright which had a value at that time of approximately $420,000. (R. 47.)

By an instrument executed November 15, 1920, in London, England (R. 25–32, Ex. A), the decedent transferred to her son, Charles H. Marshall (who, as administrator of her estate, is the respondent herein) certain cash, stocks, bonds and other securities listed in a schedule attached to the instrument. Shortly after the transfer all of the shares of stock and registered bonds included in the securities transferred which were then standing in the decedent's name were transferred to the son's name. (R. 47–48.)

On the date of the transfer, November 15, 1920, the decedent entered into another agreement with her son (R. 33–42, Ex. B), which—after reciting the fact of the first agreement, and "the understanding" of the parties that in the event of the son's death during his mother's lifetime the securities and cash described in the schedule, or securities and cash of equal value, should be reconveyed to her—provided as follows (R. 33–35):

> I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as

nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the

above mentioned "Charles H. Marshall, Special Account", the amount of any State and Federal inheritance taxes due by virtue of such transfer.

VI. This agreement shall be binding upon the heirs, executors, administrators and assigns of both parties hereto.

During the decedent's life the son, in accordance with paragraph I of the agreement, paid to the decedent or for her account such portions of the income derived from the Special Account as she requested. In accordanee with paragraph III he executed a will early in December, 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of his will was revoked after his mother's death in 1933. (R. 50.)

Prior to the transfer in 1920 the decedent included the income from the transferred securities in her return. Since the transfer the son has reported the income. (R. 50.)

The Commissioner included the value of the securities, $468,115.07, in the decedent's gross estate as property of which the decedent made a transfer intended to take effect in possession or enjoyment at or after her death, and determined a Federal estate tax of $40,858.34. (R. 46.) The Board of Tax Appeals reversed the Commissioner's determination (R. 56), and the Circuit Court of Appeals affirmed, *per curiam*, the Board's decision (R. 71).

SPECIFICATION OF ERRORS TO BE URGED

The Commissioner urges that the court below erred:

1. In holding and deciding that the transfer effected through the medium of the instruments of transfer aforesaid was not intended to take effect in possession or enjoyment at or after the decedent's death.

2. In not holding and deciding that the aforesaid disposition, effected through the medium of transfer aforesaid, was intended to take effect in possession or enjoyment at or after the decedent's death.

3. In affirming the decision of the Board of Tax Appeals that there is no deficiency in the estate tax, instead of a deficiency of $40,858.34, as set forth in the notice of deficiency.

REASONS FOR GRANTING THE WRIT

This case presents the question whether Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 of the Revenue Act of 1932 (Appendix, *infra,* pp. 9, 10), should be construed to apply to transfers made prior to the dates of the passage of the amendments, and, if so applied, whether it violates the Constitution. The same question as to the construction and validity of these statutes is involved in *Thomas B. Hassett* v. *E. Sohier Welch,*

in which the Government has filed a petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, No. 375, October Term, 1937.

The only difference in the facts in this case is that the transfer by the decedent was effected by two agreements executed the same day. The first purported to make an outright transfer of certain cash and securities by the decedent to her son. The second required that the securities be held in a separate fund; that so much of the income arising therefrom as the decedent should request should be paid to her during her lifetime; and that the son should bequeath to the decedent, provided she should survive him, all of the securities forming a part of the fund at his death.

We believe that the two agreements must be construed together—as they were by the Board of Tax Appeals, and presumably by the court below—and hence that there is no material distinction between the two cases on the facts. The court below apparently considered that there was none, for it decided the case, *per curiam,* upon the authority of the decisions of the Circuit Courts of Appeals in ***Welch*** v. ***Hassett***, 90 F. (2d) 833 (C. C. A. 1st), and ***Bullard*** v. ***Commissioner,*** 90 F. (2d) 144 (C. C. A. 7th), now pending before this Court on the Government's petition for a writ of certiorari, No. 349, October Term, 1937.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted for the reasons urged in the petition in *Thomas B. Hassett* v. *E. Sohier Welch, supra.*

STANLEY REED,
Solicitor General.

OCTOBER 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) [As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516.] To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.* (U. S. C., Title 26, Sec. 411.)

[The language in italics represents the new matter added by the 1931 Amendment.]

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and de-

scribed therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Sec. 411.)

* * * * *

Treasury Regulations 80 (1934 Ed.):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.* — Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See Section 506 of the Revenue Act of 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 484

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 20–24) is not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 30) is reported in 91 F. (2d) 1010.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1937 (R. 30). The petition for a writ of certiorari was filed October 6, 1937, and

was granted November 8, 1937. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, may be applied to trusts created before the dates of passage of the amendments.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 9–14.

STATEMENT

The facts as stipulated (R. 8–19) and as found by the Board of Tax Appeals (R. 19–22) are as follows:

Josephine B. Marshall died, intestate, June 4, 1933, a citizen of the United States and a resident of New York. Respondent, her son, is the administrator of her estate (R. 20).

By an instrument executed November 15, 1920, she transferred to her son certain cash, stocks, bonds, and other securities, which had at that time a value of approximately $420,000 (R. 20–21).

On the same day, November 15, 1920, the decedent concurrently entered into a supplemental agreement with her son (R. 14–18, Ex. B), which—after reciting the fact of the first agreement, and

"the understanding" of the parties that in the event of the son's death during his mother's lifetime the securities and cash described in the schedule, or securities and cash of equal value, should be reconveyed to her—provided as follows (R. 14–15):

> I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.
>
> II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account," or some name of a similar nature.
>
> III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the

date of his death, the above mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the above mentioned "Charles H. Marshall, Special Account," the amount of any State and Federal inheritance taxes due by virtue of such transfer.

VI. This agreement shall be binding upon the heirs, executors, administrators, and assigns of both parties hereto.

During the decedent's life the son, in accordance with paragraph I of the agreement, paid to the decedent or for her account such portions of the income derived from the Special Account as she requested. In accordance with paragraph III he executed a will early in December 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of his will was revoked after his mother's death in 1933 (R. 22).

The Commissioner included the value of the securities, $468,115.07, in the decedent's gross

estate as property of which she had made a transfer within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended, and determined a Federal estate tax of $40,858.34 (R. 20). The Board of Tax Appeals reversed the Commissioner's determination (R. 25), and the Circuit Court of Appeals affirmed, *per curiam*, upon the authority of *Welch* v. *Hassett*, 90 F. (2d) 833 (C. C. A. 1st), and *Bullard* v. *Commissioner*, 90 F. (2d) 144 (C. C. A. 7th), both now pending before this Court, Nos. 375 and 349, respectively.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the property embraced within the transfer effected by the two instruments of November 15, 1920, could not be included in the decedent's gross estate in accordance with Section 302 (c) of the Revenue Act of 1926, as amended.

2. In not holding that Section 302 (c) of the Revenue Act of 1926, as amended, was applicable and constitutional as applied to said transfer.

3. In affirming the decision of the Board of Tax Appeals that there is no deficiency in the estate tax, instead of a deficiency of $40,858.34, as set forth in the notice of deficiency.

ARGUMENT

The transfer of November 15, 1920, is embraced within the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and as further amended

by the Revenue Act of 1932 (see Appendix, *infra*, pp. 9–10), which deals specifically with a

> transfer, by trust or otherwise, under which he [the transferor] has retained for his life * * * (1) the possession or enjoyment of, or the right to[1] the income from, the property * * *

---

[1] The phrase "the right to" was added by the Revenue Act of 1932, and did not appear in the Joint Resolution of March 3, 1931. However, Congress had understood the Joint Resolution as so providing, and regarded the additional phrase in the 1932 Act merely as a clarification. See H. Rep. No. 708, 72d Cong., 1st Sess., p. 47; S. Rep. No. 665, 72d Cong., 1st Sess., p. 50.

In the court below, respondent relied on those committee reports as declaring that the provisions amending Section 302 (c) were to be "without retroactive effect." But such reliance was based on a misreading of the reports. The 1931 amendment was changed in the 1932 Act in four respects. Two of the changes were merely for purposes of clarification. Thus as to the first (the insertion of the words "or for any period which does not in fact end before his death"), both reports specifically state "This is a clarifying change and does not represent new matter." *Ibid.* Similarly as to the second change (the insertion of the words "the right to the income" in place of "the income"), both reports declare "This is also a clarifying change." *Ibid.* However, the remaining two changes in the 1932 amendment (not involved in this case) made rather radical departures from the 1931 amendment. It is that new material that the committee reports declared to be "without retroactive effect." Thus the report of the House committee states (p. 46):

"The purpose of this amendment to section 302 (c) of the revenue act of 1926 is *to clarify* in certain respects *the amendments* made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not

The issues herein are substantially identical with those in *Hassett* v. *Welch,* No. 375, present Term, and we respectfully refer the Court to our brief in that case, where we contend not only that Congress meant to reach transfers made before the 1931 and 1932 amendments, but that the tax, as so applied, does not contravene the due process clause.

The only variation here is that the transaction was effectuated through two instruments instead of one, and that the retention of the life interest was in the form of a binding promise of the transferee or trustee. That variation, however, should not be material. Cf. Restatement, Trusts (1935) § 42 (b), and comment *a.* Otherwise, the effectiveness of these provisions would be reduced to nothing, since it would be a trifling matter for a draftsman in preserving a life estate to the grantor to achieve that result in the same way as was done here. It is hardly likely that Congress intended to furnish so ready a vehicle for the avoidance of this tax.

The state courts have often been called upon to determine whether the transferee's undertaking to pay over the income to the transferor for

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taxable if irrevocable and not made in contemplation of death. *Certain new matter* has *also* been added, *which is without retroactive effect.*" [Italics supplied.]

Substantially the same statement appears at p. 49 of the report of the Senate committee. Accordingly, it is clear from those reports that the basic amendment of 1931 and the clarifying provisions of 1932 were not restricted to prospective operation only, but that only "certain new matter," not involved here, was to be "without retroactive effect."

life or to reconvey a life estate was the equivalent of a *reservation* of a life interest, and their answer has uniformly been in the affirmative. *In re Hubbs*, 41 Ariz. 466; *People* v. *Estate of Moir*, 207 Ill. 180; *In re Estate of Schuh*, 66 Mont. 50; *In re Perry*, 111 N. J. Eq. 176; *In re Harvey*, 2 N. J. Misc. 247, affirmed, *sub nom. Moore* v. *Bugbee*, 3 N. J. Misc. 435, *affirmed*, 102 N. J. L. 720, writ of error dismissed, 278 U. S. 565; *American Bd. Comm'rs* v. *Bugbee*, 98 N. J. L. 84; *Matter of Miller*, 236 N. Y. 290, 295–296; *Barber's Estate*, 304 Pa. 235; *Reish. Adm'r* v. *Commonwealth*, 106 Pa. 521; *Conwell's Estate*, 5 Pa. Co. Ct. 368; *Meyers's Estate*, 16 Pa. Dist. Rep. 284; *Estate of Ogden*, 209 Wis. 162. Cf. *In re Wallace's Estate*, 282 Pac. 760 (Ore.). That Congress intended a like result here seems too plain for further comment.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
Special Assistants to the Attorney General.

DECEMBER 1937.

APPENDIX

As originally enacted, Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provided:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

The Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, amended subsection (c) to read as follows (the language in italics representing the new matter):

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except

in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411 (c).)

Section 302 (c) was further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to read as follows:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411,)

Section 302 (h) of the Revenue Act of 1926, *supra:*

Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights,

powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

Regulations 80 (1934):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Regulations 70 (1929 Edition):

ART. 18. *Reservation of income or an annuity.*—A transfer, not amounting to a bona

fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.

* * * * *

Article 18 of Regulations 70 (1926 Edition), and of Regulations 68 (1924) contains in substantially the same language the foregoing provisions of Article 18 of Regulations 70 (1929 Edition).

Regulations 63 (1922):

ART. 20. *Reservation of income.*—A transfer, not amounting to a bona fide sale for a fair consideration in money or money's worth, is taxable where the decedent re-

served to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate. Where the decedent reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserved an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the decedent reserved the annuity out of the property conveyed, or payment thereof to him was made by the grantee upon an express or an implied agreement to that effect. * * *

Regulations 37 (1921 Edition):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in con-

templation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. * * *

Regulations 37 (1919 Edition), Article 24, contains provisions identical with the foregoing.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 484.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

CHARLES H. MARSHALL, Administrator of the Estate of Josephine B. Marshall, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals (R. 20-24) is not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 30) is in 91 F. (2d) 1010.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 6, 1937 (R. 30). The petition for certiorari was filed October 6, 1937, and granted November 8, 1937.

Questions Presented.

This case arises under the estate tax provisions of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and the Revenue Act of June 6, 1932.

Prior to March 3, 1931, there was no provision in the Federal estate tax laws to the effect that property transferred irrevocably, reserving to the grantor only the income for life, should be included in the value of the grantor's estate for estate tax purposes.

By the Joint Resolution of March 3, 1931, subdivision (c) of Section 302 of the Revenue Act of 1926 was amended by adding a provision including such a transfer.

By the Revenue Act of June 6, 1932, subdivision (c) of Section 302 of the Revenue Act of 1926 was reenacted substantially as so amended by the Joint Resolution of March 3, 1931.

The questions presented are:

(1) Whether the Joint Resolution of March 3, 1931, or the Act of June 6, 1932, should be construed to apply to such a transfer made in 1920; and

(2) If construed to apply to transfers made prior to March 3, 1931, do they violate the due process clause of the Fifth Amendment to the Constitution of the United States?

Statutes and Regulations Involved.

The chronology of these is important.

The pertinent provisions of Section 302 of the Revenue Act of 1926, C. 27, 44 Stat. 9, are as follows:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——

(a) To the extent of the interest therein of the decedent at the time of his death;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(e) [Deals with property held in joint tenancy.]

(f) [Deals with property passing under powers of appointment.]

(g) [Deals with life insurance on decedent's life.]

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution of March 3, 1931 (46 Stat. 1516) is as follows:

"Chap. 454.—Joint Resolution To amend section 302 of the Revenue Act of 1926.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.' (Italics supplied to show the new provision.)

Approved, March 3, 1931."

Then came a Treasury regulation, as follows (T. D. 4314, C. B. X-1, 450):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S. 531 [T. D. 4072, C. B. VI-2, 351]); *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]); *Coolidge* v. *Long* (282 U. S. 582); *Burnet* v. *Northern Trust Co.* (51 S. Ct. 342); *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct. 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct. 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provi-

sions of section 302(h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury."

On April 11, 1932, came a regulation as follows (T. D. 4336, C. B. XI-1, 329):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

Art. 18. *Retention of possession, enjoyment, or income.—Any transfer which was made by the decedent after 10.30 p. m. Washington, D. C., time, March 3, 1931,* and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or

enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.
OGDEN L. MILLS,
Secretary of the Treasury."
(Italics supplied.)

Following these regulations came the Revenue Act of June 6, 1932, C. 209, 47 Stat. 169, section 803 of which is as follows:

"SEC. 803. FUTURE INTERESTS.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for

his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.'

(b) [This amended 302(f) of the Revenue Act of 1926 relating to powers of appointment.]

(c) [This amended 315(b) of the Revenue Act of 1926 making the transferee, the beneficiary or trustee personally liable.]"

It will be noted that neither the Joint Resolution nor the Act of June 6, 1932, brought up to date or reenacted subdivision (h) of the Revenue Act of 1926 with its provisions for retroactivity.

The regulations of the Treasury Department, above quoted, stood until November 7, 1934, when, in Regulations 80, Article 18 was amended to read as follows:

"Art. 18. Transfers with possession or enjoyment retained.—(a) *Transfers included.*—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after

his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. *The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932.* See section 506 of the Revenue Act of 1934." (Italics supplied.)

On October 26, 1937, the 1937 edition of Regulations 80 was issued, in Article 18 of which there was repeated in the following words the provisions of Article 18 of Regulations 80 issued November 7, 1934, relating to trusts reserving to the trustor the income for life:

"The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932."

Statement.

The facts were stipulated (R. 8-10) before the Board of Tax Appeals.

Josephine B. Marshall died June 4, 1933.

In November, 1920, by a written instrument, she granted, assigned and transferred to her son, Charles H. Marshall, certain securities then owned by her of the value of about $420,000. On its face this was an absolute transfer without any reservation, but on the same day the mother and son signed an agreement (R. 14-15), by the terms of which the son agreed to pay to his mother, during her life, such portion of the income from the securities as she might from time to time request. The son was authorized to sell the securities and reinvest the proceeds and keep the fund in a special account.

We agree with the Government that the two instruments are to be treated as one and have the same effect as a grant to the son with a reservation of the income for life to the grantor.

Prior to the Joint Resolution of March 3, 1931, there had been no provision of the Federal estate tax law taxing irrevocable transfers not in contemplation of death, which reserved only the income for life to the grantor. At the date of Josephine B. Marshall's death, Treasury Regulations were in force to the effect that neither the Joint Resolution of March 3, 1931, nor its reenactment June 6, 1932, applied to transfers of this kind made prior to March 3, 1931, and the estate tax return showing no tax liability was made pursuant to such regulations. Before the tax liability was finally adjusted, the Treasury, on November 7, 1934, reversed its regulations, not as to the Joint Resolution, but as to the Act of June 6, 1932,

and the Commissioner of Internal Revenue, in computing the Federal estate tax, included in the value of her estate the value at the time of her death ($468,115.07) of the funds so held by the son, and as a result determined in January, 1935, that a tax liability existed in the sum of $40,858.34.

The Board of Tax Appeals reversed the Commissioner (R. 20-25) and the United States Circuit Court of Appeals, *per curiam,* affirmed the decision of the Board (R. 30) on the authority of *Welch* v. *Hassett,* 90 F. (2d) 833, C. C. A., First Circuit (now pending here as No. 375, October Term, 1937), and *Bullard* v. *Commissioner,* 90 F. (2d) 144, C. C. A., Seventh Circuit (now pending here as No. 349, October Term, 1937).

Summary of Argument.

I. The Joint Resolution of March 3, 1931, amending Section 302(c) of the 1926 Act, reenacted June 6, 1932, should not be construed to apply to transfers made prior to its passage.

The Resolution contains no provision for retroactive application. The phrase "at any time made" has been held to refer to the period traveling back from date of death to the date of passage of the Act.

Subdivision (h) of Section 302, Revenue Act of 1926, with its provisions for retroactivity, referred only to the trusts then enumerated in (c), and was not reenacted or referred to when the additions to the enumeration in (c) were made in 1931 and 1932.

Four rules of construction are applicable:

(1) Where one section of a statute refers to

another and the other is later amended, the operation of the one is not changed.

(2) A statute should not be construed as retroactive unless clearly and imperatively required by its terms.

(3) A retroactive effect should be avoided, if possible, where otherwise a constitutional question would arise.

(4) Doubt as to the meaning of a statute imposing taxes should be resolved in favor of the taxpayer.

Those in charge of the Resolution in Congress said it was not retroactive.

The Treasury, by Regulation, immediately ruled that the Resolution was not applicable to transfers made before its passage. That Regulation was repeated April 11, 1932.

The Act of June 6, 1932, reenacted the Joint Resolution without material change. The Congress thus accepted the rulings of the Treasury, and affirmed that neither the Resolution nor the Act was intended to be retroactive.

The Treasury Regulations stood unchanged for nearly four years after March 3, 1931, and for more than a year after the decedent's death. The Regulation that the Joint Resolution is not retroactive is still in effect. The change, made November 7, 1934, was that the Act of June 6, 1932, is retroactive though the Joint Resolution was not. This distinction is arbitrary and without basis. If the one was not retroactive, the other was not. The ruling of the Treasury long in effect should be given weight in interpreting the Act.

If the meaning of a statute is obscure the doubt should be resolved in favor of the taxpayer.

II. If construed to apply to trusts made years before its passage, the Joint Resolution, reenacted June 6, 1932, violates the due process clause of the Fifth Amendment.

In a series of decisions this Court has held that an irrevocable grant, reserving only income for the life of the grantor is not testamentary in character and does not take effect on the death of the grantor. It is claimed by the Government that transfers of this type not in contemplation of death, and not truly testamentary, may be classified as testamentary by estate tax laws, because they have some attributes of a testamentary disposition and a tendency to avoid estate taxes.

The question whether they may be so classified prospectively was left open in *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, but the contention that such a classification may be applied retroactively to transfers made years before the passage of the Act treating them as testamentary, has been foreclosed by *Helvering* v. *Helmholz,* 296 U. S. 93, and *White* v. *Poor,* 296 U. S. 98. The income tax cases in which the Court has upheld statutes passed during the tax year or shortly thereafter, and cases involving retroactive taxes under limited conditions, are readily distinguishable.

The Government's argument that in 1920, when this transfer was made, the decedent was forewarned by regulations then in force, but afterward held unauthorized, and by decisions of state courts, that a taxing act might be passed eleven years later, carries the doctrine of notice or forewarning as a justification for

retroactive laws beyond any point indicated by any decision of this Court or even any dissenting opinion.

The case of *Helvering* v. *Helmholz, supra,* is not distinguishable in principle, though dealing with a different section of the statute. It is not distinguishable on the question of forewarning of the taxpayer. In that case the decedent had even more reason to anticipate a statute taxing, as testamentary, transfers containing a provision for termination, wholly defeating the grantee's interest, than the decedent in this case had, to expect a law taxing as testamentary an irrevocable transfer, under which the grantee's remainder could not be defeated.

ARGUMENT.

I.

Neither the Joint Resolution of March 3, 1931, nor the Act of June 6, 1932, should be construed to apply to irrevocable transfers of the kind here involved, made before March 3, 1931.

Prior to March 3, 1931, there had been no provision in the Federal estate tax law taxing as part of a decedent's estate irrevocable grants or trusts not in contemplation of death by which only the income for life was reserved to the trustor. The only provision of the law claimed to have that effect was the one taxing "transfers intended to take effect in possession or enjoyment" at or after the death of the transferor.

In *May* v. *Heiner,* 281 U. S. 238 (decided April 14, 1930) the Court held that the phrase above

quoted did not include a transfer in which the income was withheld from the transferee until the death of the grantor, because such trusts, if irrevocable, were not testamentary in character and were beyond recall by the decedent, and on her death no interest in the property held under the trust passed from her to the living. *May* v. *Heiner* merely reiterated principles announced in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (decided January 2, 1929) and earlier cases. Notwithstanding these decisions the Treasury Department brought up three more cases (*Burnet* v. *Northern Trust Co.; Morsman* v. *Burnet;* and *McCormick* v. *Burnet,* 283 U. S., pages 782, 783 and 784) which, on March 2, 1931, the Court decided in *per curiam* opinions, upon the authority of *May* v. *Heiner.* At the time these three decisions were rendered, only one more day remained of the pending session of Congress.

The Treasury Department immediately drafted an amendment to Section 302(c) of the Revenue Act of 1926, so as to tax trusts of the type in question. This measure, the Joint Resolution of March 3, 1931, was rushed to the Congress and on March 3, 1931, was passed under suspension of the Rules. (See, letter of the Secretary of the Treasury, Congressional Record, Vol. 74, Part 7, 71st Congress, 3rd Session, p. 7198).

The Terms of the Joint Resolution Do Not Require That It Be Given a Retroactive Effect.

The Government asserts that it is plain from its terms that the Joint Resolution was intended to apply to transfers made before its passage, and that there is not room for construction. It contends

(1) that the words "at any time" appearing in the sentence "to the extent of any interest therein of which the decedent has *at any time* made a transfer, by trust or otherwise", in the Joint Resolution, cover trusts previously made; and (2) that in any event subdivision (h) of the Revenue Act of 1926 unequivocally makes the Joint Resolution retroactive.

The first contention has already been rejected by this Court.

The phrase "to the extent of any interest therein of which the decedent has *at any time* made a transfer" first appeared in Section 202(b) of the Revenue Act of 1916, and has appeared in all subsequent revenue acts. It was not amended or changed by the Joint Resolution of March 3, 1931.

In *Shwab* v. *Doyle,* 258 U. S. 529, decided May 1, 1922, the Government made precisely the same contention it is now making as to the effect of the words "at any time", and asserted that they covered periods prior to the date of the enactment of the Taxing Act (see 258 U. S., p. 530). The taxpayer in that case contended that those words covered a period traveling backward from the date of the death of the decedent to the date of the enactment of the law, and with that construction this Court agreed.

Furthermore, the words "at any time" appearing in subdivision (c) of Section 302 of the Revenue Act of 1926 could not have been intended to have the effect claimed by the Government, for otherwise the retroactive provisions of subdivision (h) of that section would have been surplusage. The fact that the Congress enacted subdivision (h) shows that it understood that the phrase "at any time"

in (c) was not broad enough to cover transfers completed before the passage of the taxing statute. See, *Shwab* v. *Doyle, supra,* at page 536; *Lewellyn* v. *Frick,* 268 U. S. 238, at page 252.

There is nothing in the Joint Resolution itself or in the provisions of subdivision (c) as amended by the Joint Resolution to make it retroactive so as to apply to trusts created before its passage.

The only question as to whether the amendment of March 3, 1931, applies to trusts previously made, arises because of subdivision (h) of Section 302 of the Revenue Act of 1926, reading as follows:

> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, *as severally enumerated and described therein,* whether made, created, arising, existing, exercised, or relinquished before or after the enactment of *this Act.*" (Italics ours.)

The question of interpretation is whether this provision for retroactivity applies to transfers *added to that enumeration by later statutes.* It will be noted that in the Joint Resolution amending subdivision (c) the Congress *did not bring up to date or reenact subdivision (h),* or by anything in the Joint Resolution indicate that the provisions for retroactivity in subdivision (h), applicable to subdivision (c) as it stood in 1926, were to apply to transfers not severally enumerated in 302(c) of the 1926 Act, but added on March 3, 1931. Subdivision (h) of the 1926 Act appeared as subdivision (h) in Section 302 of the Revenue Act

of 1924. In the 1926 Act, after making amendments to the various subdivisions of Section 302 of the 1924 Act, Congress reenacted subdivision (h), making it clear that the provisions for retroactivity in (h) were brought up to date so as to apply to the previous subdivisions as amended. If it had followed that course in the Joint Resolution, there would have been no question as to its intent to make subdivision (h) applicable to transfers, of the type here involved, added to the enumeration in (c) by the Joint Resolution.

Obviously, under these conditions, the statute, as amended March 3, 1931, is open to the construction that the provisions of (h) do not apply to the new type of trust then subjected to the tax. The phrase "before or after the enactment of *this Act*" in subdivision (h) of Section 302 of the Revenue Act of 1926, fortifies our position. The underlined words obviously refer to the Act of 1926, making the date of the passage of that Act the dividing line referred to, and certainly the date of the passage of the Act of 1926 cannot appropriately relate to a new object of taxation first taxed on March 3, 1931.

This situation brings into application several rules of statutory construction.

Where One Section of a Statute Refers to Another Section and the Other Is Afterwards Amended, the Operation of the One Is Not Changed.

Occasions for the application of this rule are not common, and there is a conflict of authority. It has been held that where one statute adopts the existing provisions of another statute and the latter is after-

wards amended, the amendments are no part of the adopting statute.

In Lewis' Sutherland on Statutory Construction, 2nd Edition, Vol. II, pp. 787-8, the rule is thus stated:

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. * * * Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

In *Culver* v. *People,* 161 Ill. 89, it was said:

> "The general rule is that an act which adopts, by reference, the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly-implied intent."

See, also, *In re Heath,* 144 U. S. 92, 93; *United States* v. *Mercur Corporation,* 83 F. (2d) 178.

The question here is whether the rule, applicable to the case of two separate statutes, applies to a situation like the present, where one section of a statute refers to another section of the same statute.

In *Calumet Foundry & Machine Co.* v. *Mroz,* 79 Ind. App. 305, the Court, after referring to the rule above stated, said:

> "The same rule would evidently apply where

> one section is made a part of another section of the same act by specific reference, as was done in this case."

See, also, *Crohn* v. *Telephone Co.*, 131 Mo. Appeals 313, 321-2; *Flanders* v. *The Town of Merrimack*, 48 Wis. 567; *Gustafson* v. *Hammond Irrigation District of Rosebud County*, 87 Mont. 217; *State* v. *Beckner*, 197 Iowa 1252; *American Bank* v. *Goss*, 204 App. Div. 759.

The case last cited, applying the rule where two sections of the same statute were involved, was reversed by the Court of Appeals of New York in 236 N. Y. 488. Our search reveals no other cases on that point. The New York Court of Appeals stands alone against the other cases cited. Furthermore, the rule referred to is only a rule of construction, and there come into application here two other rules of construction, (1) that a statute will not be construed as retroactive "unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied"; and (2) that, if possible, a statute will not be construed so as to raise a grave constitutional question. In the case in the New York Court of Appeals, the interpretation adopted did not require that either of these rules be disregarded. There is nothing in the opinion of the New York Court of Appeals to suggest that the rule it followed would be applied so as to override the other more important rules. Even if the rule of statutory construction followed by the New York Court be considered normally preferable to that adopted in *Culver* v. *People*, 161 Ill. 89, and the other cases above cited, it should not be followed in a case like

the present with the result of violating the two more cogent rules that a statute should not be construed as retroactive, or so as to raise constitutional questions.

In the present case, subdivision (h) did not "adopt" subdivision (c) of Section 302 of the Act of 1926. It referred to it and broadened its application, but the principle of the rule above stated is applicable.

A Statute Will Not Be Given a Retrospective Operation Unless that Intention Has Been Manifested by the Most Clear and Unequivocal Expression.

In *United States Fidelity Co.* v. *Struthers Wells Co.,* 209 U. S. 306, this Court said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

United States v. *Heth,* 3 Cranch. 399, 413; *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160, 162; *Reynolds* v. *McArthur,* 2 Peters 417, 434.

This rule has been applied with strictness in the case of gift and estate taxes. *Shwab* v. *Doyle,* 258 U. S. 529; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blod-*

gett v. *Holden*, 275 U. S. 142; *White* v. *Poor*, 296 U. S. 98; *Industrial Trust Co.* v. *United States*, 296 U. S. 220.

In the case last cited the Court had under consideration the operation of subdivision (h) of Section 302 of the 1926 Act. The question was whether the words "transfers, trusts, estates", etc. in subdivision (h) were broad enough to include life insurance taken out by the decedent, and covered by subdivision (g). The question of construction there was not the same as here, but the Court held that it was fairly debatable whether the words above quoted did include life insurance. Surely, the question which we now have, *i. e.*, whether the provision for retroactivity in subdivision (h) of Section 302 of the Revenue Act of 1926 should be carried forward and applied to an additional type of trust first mentioned in the amendment of 1931, is at least as fairly debatable as the question in *Industrial Trust Co.* v. *United States.*

There Is Applicable Here the Rule that a Statute Will Be Construed, If Possible, to Avoid Raising a Grave Constitutional Question.

On this point see *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348-9; *Bingham* v. *United States*, 296 U. S. 211; *Industrial Trust Co.* v. *United States*, 296 U. S. 220, 221; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98. If this statute were construed as retroactive, the Court would be faced with a constitutional question. We think it is not an open one because it has been decided (see pp. 33-53 this Brief), but the petitioner wants the former decisions on the question reconsidered or distinguished. In

either view, the reason for this rule of construction is present.

The extent to which courts go in interpreting statutes to avoid giving them retroactive effect, or raising constitutional questions, is illustrated in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *United States* v. *Goelet,* 232 U. S. 293, 297; *Lewellyn* v. *Frick,* 268 U. S. 238; *Shwab* v. *Doyle,* 258 U. S. 529. See opinion of four Justices in *Blodgett* v. *Holden,* 275 U. S. 142.

The conditions appearing on the face of the statute, considered in the light of the rules of construction we have referred to, require that the Joint Resolution of March 3, 1931, be construed not to apply to transfers previously made, but if there be any doubt about that, it is removed by resort to the Congressional Record, to the rulings of the Treasury Department *and to subsequent action of Congress confirming our interpretation,* none of which can be excluded from the consideration of the Court by the assertion of the petitioner that the amendment made by the Joint Resolution is too plain to give room for construction.

Resort to the Congressional Record, to Treasury Regulations and to Subsequent Action of the Congress, Confirms the View that Neither the Joint Resolution Nor the Act of June 6, 1932 Was Intended to Be Retroactive.

Statements by members of Congress in charge of a bill, as well as reports of committees of House or Senate "may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure." *Duplex Co.* v. *Deering,* 254 U. S. 443, 474.

Mr. Hawley of the Ways and Means Committee of the House was in charge of the Joint Resolution on the floor. We note especially the following:

> "Mr. Sabath: Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?
>
> Mr. Hawley: *It provides that hereafter no such method shall be used to evade the tax*" (Congressional Record, Vol. 74, Part 7, 71st Congress, 3d Session, p. 7198). (Italics ours.)

Mr. Hawley also said:

> "It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, *it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property.* It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. *It is for that purpose* that the joint resolution is proposed" (Congressional Record, Vol. 74, Part 7, 71st Congress, 3d Session, p. 7198). (Italics ours.)

These declarations should be given more than the usual weight because the Joint Resolution was passed in the rush of the closing day of the session under suspension of the rules, *without even having been printed before passage, and in complete reliance on the statements on the floor as to what the Joint Reso-*

lution contained and as to its effect. Similar statements were made on the floor of the Senate (same Congressional Record, p. 6933). The haste with which the Joint Resolution was passed is accounted for by a purpose to reach, as soon as possible, future transfers of this type.

The Government suggests that the statements in Congress that the resolution was not retroactive meant merely that it was not retroactive in the sense of applying to cases of persons who had died prior to the enactment of the Joint Resolution. This is not supported by the Congressional Record, and it is inconceivable that anyone could have believed that such a change in the estate tax law could be made applicable to cases where the trustor had died and the rights of the parties had become fixed before the enactment of the taxing statute. Estate tax laws have uniformly been applied only to estates of persons dying after the passage of the acts.

As we will show hereafter, the action of Congress in reenacting the Joint Resolution on June 6, 1932, after Treasury rulings that the Joint Resolution did not apply to trusts made before its passage, confirms our interpretation of what occurred on the floor of Congress in connection with the Joint Resolution.

On May 22, 1931, shortly after the enactment of the Joint Resolution, the Treasury Department issued a regulation (see p. 5 of this Brief) that the Joint Resolution should not be applied to trusts created before its passage. As the resolution was drafted by the Treasury and passed at its urgent request, it is fair to assume that Congress and the Treasury were in accord as to its meaning, and that the congressmen and senators who made their statements on the floors took their cue from the Treasury, and it

is evident from the Treasury regulation referred to and later ones, that the Treasury understood that the Joint Resolution did not apply to transfers made before its passage.*

The Congress did not deal with the subject again until it passed the Revenue Act of June 6, 1932. Meanwhile, the Treasury had made the regulation of May 22, 1931, and a formal amendment to its regulations (April 11, 1932), to the effect that the Joint Resolution had no application to trusts made before its passage (see p. 6 of this Brief).

So far as estate taxes were concerned, the Revenue Act of 1932 was not a complete statute, but merely amended particular sections of the 1926 Act. Section 803 of the Act of 1932 amended subdivisions (c) and (f) of Section 302 of the Act of 1926. In amending subdivision (c), the Act of 1932 reenacted, without change in substance of any matter material in this case, but with some clarifying provisions, subdivision (c) of the Act of 1926 *as it had been amended by the Joint Resolution.* In the committee reports in both House and Senate, it was said:

> "The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer

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* The petitioner suggests that the Treasury regulation of May 22, 1931, is not an interpretation, but a refusal to apply the Joint Resolution restrospectively according to its terms, because it could not constitutionally be thus applied. It would be going a long way for the Treasury to hold a statute invalid, and the better view is that the Treasury meant that subdivision (h) of the 1926 Act should not be construed to apply to the 1931 addition to (c) because to do so would raise a grave constitutional question.

> under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect" (House Committee Report No. 708, 72nd Congress, 1st Session; Senate Committee Report No. 665, same session).

As in the case of the Joint Resolution, *the Act of 1932 did not bring up to date or reenact subdivision (h) of Section 302 of the 1926 Act.* If the Joint Resolution did not apply to trusts created before its passage, clearly, as reenacted in Section 803 of the Act of 1932, it did not apply to trusts created before March 3, 1931. The petitioner's brief is vague about this, but does not claim that the Act of 1932 applied to trusts created before the passage of the Joint Resolution, if the Joint Resolution did not.

That there was no basis for distinction in this respect between the Joint Resolution and the Act of June 6, 1932, was recognized by the Treasury until November 7, 1934, because until that date it allowed to stand as applying to cases of persons dying after June 6, 1932, the amendment to Article 18 of the Regulations, first made in May, 1931, and repeated April 11, 1932, to the effect that no such transfer made prior to March 3, 1931, should be taxed.

We thus find that on June 6, 1932, Congress reenacted the provisions of the Joint Resolution after it had been construed as non-retroactive by the Treasury Department. It thus took the Joint Resolution with the regulations tacked to it and accepted the interpretation of the Joint Resolution which the Treasury De-

partment had adopted. *McFeely* v. *Commissioner*, 296 U. S. 102, 108; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 179; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Brewster* v. *Gage*, 280 U. S. 320, 327; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466.

By clear implication the regulations were ratified by Congress. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 95.

This not only shows that the reenactment by the Act of 1932 was not intended to apply to trusts created before the passage of the Joint Resolution, but has another repercussion, *i. e.*, that the Congress agreed that the Joint Resolution had not been intended to apply to trusts previously created. It confirms our interpretation of the statements on the floors of Congress when the Joint Resolution was passed.

The regulations of the Treasury to the effect that the Joint Resolution did not cover transfers of the type here involved made before March 3, 1931, were allowed to stand without change, as governing estates of decedents dying after the passage of the Act of June 6, 1932, for three years and eight months after the Joint Resolution was passed. Not until November 7, 1934, did the Treasury Department (evidently searching for revenues to meet the increasing deficits) change its view. By Article 18, Regulations 80, of November 7, 1934 (see p. 8 of this Brief), after referring to the taxability of transfers in trust where the income for life was reserved to the trustor, the Treasury said:

"The provisions of this subdivision do not

apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932."

The hours and dates in this regulation refer respectively to the times of approval of the Joint Resolution and of the Act of June 6, 1932.

This regulation is to the effect that the Joint Resolution did not apply to transfers made before its passage, but that the Act of June 6, 1932, reenacting it, did apply to those made prior to March 3, 1931, provided the grantor died after the passage of the 1932 Act. That regulation was reiterated and reissued as late as October 26, 1937 (see p. 9 of this Brief). Thus it is seen that the Treasury Regulations *still follow the rule that the Joint Resolution did not apply to transfers made before its passage.** They do provide that by virtue of the Act of June 6, 1932, such transfers made since the enactment of the first estate tax law of 1916 are taxable under the estate tax law, provided the grantor lived until after June 6, 1932. There is no basis for making this distinction between the Joint Resolution and the Act of June 6, 1932. It is not authorized by Section 506 of the Revenue Act of 1934. *In its brief the petitioner does not contend for such a distinction or suggest any reason for it.* The two enactments did not differ substantially, and neither reenacted subdivision (h) of Section 302 of the 1926 Act. If the

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* The Treasury stood by this in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, where it did not even argue that the Joint Resolution applied to a trust created before its passage, where the decedent died May 20, 1931. See footnote, page 10, petitioner's brief in No. 375, *Hassett* v. *Welch*.

one did not apply to transfers made before March 3, 1931, the other did not.*

The interpretation given by the Treasury to the Joint Resolution from the time of its passage to the present day, and the interpretation given to the Act of June 6, 1932, for more than two years after its passage, *and adhered to for one and one-half years after the death of Josephine B. Marshall,* cannot be overlooked. Doubtless, estates of some persons dying after March 3, 1931, whether before or after June 6, 1932, have been closed and taxes settled, without being held for taxes, such as are claimed here. It would be grossly unfair to discriminate against this and other estates where the settlement has been deferred.

This Court has repeatedly announced the rule that where there is room for difference of opinion as to the meaning of a statute, the interpretation of the officers of the law charged with its application and enforcement are given great weight, and one of the reasons for the rule is the hardship and injustice

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* How little faith the Treasury has had in its attempt to distinguish between the Joint Resolution and the Act of June 6, 1932, is shown by *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248, decided October 28, 1936, two years after the change in the Regulations made November 7, 1934. That case involved an irrevocable trust reserving income for life of the grantor, made in January 1928, the grantor having died August 3, 1933. It was squarely within the amended Regulation of November 7, 1934. The Board said:

> "Respondent (the Commissioner of Internal Revenue) in his brief does not contend that * * * section 803(a) of the Revenue Act of 1932, is applicable."

After discussing the law, the Board added:

> "* * * we think the respondent is correct in making no contention that the amendment to section 302(c) of the Revenue Act of 1926 contained in section 803(a) of the Revenue Act of 1932 has any effect in the present proceeding."

of retroactive changes. *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Logan* v. *Davis*, 233 U. S. 613, 627; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *United States* v. *Moore*, 95 U. S. 760, 763.

Manhattan Co. v. *Commissioner*, 297 U. S. 129, is not against us. There the Treasury overturned an earlier regulation. The Court held that the one overturned was unreasonable and contrary to the law. Here the regulations that the Joint Resolution does not apply to trusts made before its passage *have never been changed and are still in force*, and the regulation of November 7, 1934, attempting to differentiate between the Joint Resolution and the Act of June 6, 1932, and, in dealing with trusts made prior to March 3, 1931, to discriminate between decedents who died between the enactment of the Joint Resolution and the Act of 1932, and those who died after June 6, 1932, is so arbitrary and unsupported by anything in the statutes that it must be ignored by the Court under the reasoning of the case last cited, and as the Treasury has heretofore ignored it (see footnote, p. 30 of this Brief).

Reversals of rulings of this kind which have stood for long periods cause confusion and work discrimination and injustice.* The reasons against such action have grown in recent times when so much

* An illustration is found in the common practice of testators of providing in wills for payment of estate and inheritance taxes out of some specified fund. See paragraph Fourth, Will of Clara Smith, p. 48 of Record in Bullard Case No. 349. The reversal of rulings after a testator's death, so as to impose unexpected tax liabilities, often upsets the testator's legacies. See *The Farmers' Loan and Trust Co.* v. *Winthrop*, 238 N. Y. 488, where the court relieved the situation by construing the will to refer only to inheritance taxes.

of government is in the form of administrative law and regulations.

Every decision by the lower courts or the Board of Tax Appeals since March 3, 1931, has declined (regardless of the date of the decedent's death) to treat the Joint Resolution or the Act of 1932 as applicable to trusts created before the Resolution was passed. *Welch* v. *Hassett,* 90 F. (2d) 833 (C. C. A. 1st); *Smith* v. *United States,* 16 F. Supp. 397; *United States* v. *Nichols,* 92 F. (2d) 704 (C. C. A. 1st); *Myers* v. *Magruder,* 15 F. Supp. 488 (Dist. of Maryland); *Pierce* v. *Clauson,* 21 F. Supp. 259; *Helvering* v. *Marshall,* 91 F. (2d) 1010; *Collins* v. *Berryman* (E. D. Virginia, Nov. 29, 1937, C. C. H. Federal Tax Service 1938, §9035); *Foster* v. *Commissioner,* 26 B. T. A. 708, 716; *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248; *Cooper* v. *Commissioner,* 34 B. T. A. 1315; *Whiting* v. *Commissioner,* 35 B. T. A. 100; *Schneider* v. *Commissioner,* 35 B. T. A. 183; *Dahl* v. *Commissioner,* 35 B. T. A. 282; *Pearson* v. *Commissioner,* 36 B. T. A. 5; *Security-First National Bank* v. *Comm.,* 36 B. T. A. 633; *First National Bank* v. *Comm.,* 36 B. T. A. 491.

In *Welch* v. *Hassett, supra,* the Court said:

> "* * * it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before."

If Doubt Exists as to the Construction of a Taxing Statute It Should Be Resolved In Favor of the Taxpayer.

Gould v. *Gould,* 245 U. S. 151; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; *White* v. *Aronson,* 302 U. S. 16.

It is a rare case where there is such an overwhelming accumulation of reasons and rules of construction as are found here in support of the respondent's position. We think the case can be disposed of on this point, but pass on to consider the constitutional question.

II.

If the joint resolution of March 3, 1931, and its reenactment June 6, 1932, are construed to apply to transfers of the kind here involved, made before March 3, 1931, they are, as so applied, in violation of the Fifth Amendment.

The decisions of this Court on this point are clear.

The Federal estate tax is an excise tax upon the transfer of property upon the death of the owner, and is measured by the value at death of the interest transferred by death. *Knowlton* v. *Moore,* 178 U. S. 41, 49; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *Nichols* v. *Coolidge,* 274 U. S. 531, 541; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; *May* v. *Heiner,* 281 U. S. 238, 244.

No decision of this Court has ever upheld a Federal estate or gift tax imposed on an unalterable transfer, not in contemplation of death, made prior to the passage of the taxing statute. Lack of unanimity among the Justices is found only where the transfer was made during the year in which the act was passed, or made to beat a pending bill.

The rule against retroactivity has been applied not only to cases where the transfer was made prior to the passage of any estate tax law, but to cases where transfers were made while an estate tax law was in effect, and the particular type of transfer was covered for the first time by an amendment to the taxing act, passed after the transfer was made.

In *Nichols* v. *Coolidge,* 274 U. S. 531, the decedent in 1907 transferred real and personal property in trust, reserving to herself the right to the income, which right was relinquished in 1917. Also, in 1917, the decedent transferred to her children certain real property, reserving the right to use and enjoy it during her life. The question was whether the value of the property transferred should be included in the gross estate as transfers "intended to take effect in possession or enjoyment at or after death". The Court said:

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power (p. 540) * * *.
>
> Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them (p. 541) * * *
>
> Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.
>
> Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall.

Property of small value transferred before death may have become immensely valuable, and the estate tax swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2d) 625.

This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77. And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider" (pp. 542-3).

In *Blodgett* v. *Holden*, 275 U. S. 142 (see 276 U. S. 594) the question was whether the gift tax act of June 2, 1924, taxing all gifts made during the calendar year 1924 and thereafter, could be constitutionally applied to gifts made in January 1924, the bill for the act having been introduced in February, 1924. With

eight Justices sitting, an opinion, in which four concurred, held the act as applied to such gifts invalid, citing *Nichols* v. *Coolidge, supra.* Four Justices agreed that the clause "during the calendar year 1924" should be construed to apply only to that part of the year subsequent to the passage of the act.

In *Untermyer* v. *Anderson,* 276 U. S. 440, the facts were like those in *Blodgett* v. *Holden,* except that it appeared that the gifts were made May 23, 1924, nine days before the gift tax act was passed, but three months after the bill had been introduced, and after the Conference Report on the bill had been made and was pending. With a full bench the Court construed the Act to apply to gifts made any time in 1924 and held it invalid as applied to gifts made before its passage. We quote from a dissenting opinion because on other parts of it, the Government has attempted to build its argument:

> "The Act with which we are here concerned had, however, a special justification for retroactive features. The gift tax was imposed largely to prevent evasion of the estate tax by gifts *inter vivos,* and evasion of the income tax by the splitting up of fortunes and the consequent diminution of surtaxes. If, as is thought by the Court, Congress intended the gift tax to apply to all gifts during the calendar year, its purpose may well have been to prevent evasion of the gift tax itself, by the making of gifts after its introduction and prior to its passage. Is Congress powerless to prevent such evasion by the vigilant and ingenious? This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitu-

tionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560. If the legislature may prohibit the sale of confessedly innocent articles in order to insure the effective prohibition of others, I see no reason why it may not spread a tax over a period in advance of its enactment sufficiently long to insure that the tax will not be evaded by anticipating the passage of the act. Compare *United States* v. *Doremus,* 249 U. S. 86, 94. In taxation, as well as in other matters, 'the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured.' See Mr. Justice Holmes, in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 241. Under the rule now applied, even a measure framed to prevent evasion of a tax from a date when it is practically certain that the act will become law, is deemed unreasonable and arbitrary.

The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of making customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means" (pp. 450-1).

In *May* v. *Heiner,* 281 U. S. 238, the decedent, on October 1, 1917, had made an irrevocable trust reserving the income for life to her husband, and in case of his death to herself. The Court, stating that it was

unimportant whether the decedent survived her husband, held that the transfer was not one to take effect in possession or enjoyment at or after death within the meaning of the statute, and said:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.
>
> The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event (p. 243)."

In *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, the decedent had made, in February 1917, an irrevocable trust, reserving to herself the income for life. She died in 1923, and the question was whether the trust was one "to take effect in possession or enjoyment at or after death" within the meaning of that phrase, contained in the 1916 Revenue Act and repeated in the Revenue Act of 1921. The opinion, *per curiam*, after stating that the statute had already been construed by the Court, said:

> "* * * in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the Circuit Court of Appeals for the

Seventh Circuit is affirmed upon the authority of *May* v. *Heiner*, 281 U. S. 238."

The reservation of the question as to validity of *prospective* legislation carries the inference that the question of the validity of retroactive legislation was not open.

In *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, the decedent had made a trust, giving the income to his daughter for life, with remainder to others. The indenture contained a provision that the trustee could terminate the trust in his discretion, and another that if the daughter predeceased the grantor the trust should terminate, and in either case the trust estate would revert to the grantor. Neither of these contingencies had taken place. The grant was beyond the power of the grantor to revoke or alter. The question was whether the transfer was one "intended to take effect in possession or enjoyment at or after death" within the meaning of the Revenue Act of 1924. The Court said:

"'The event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of his estate either by will or the law relating to intestacy. When, therefore, § 302 (c) includes within the purview of § 301 (a) a transfer *inter vivos* 'intended to take effect in possession or enjoyment at or after his death,' it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy.

'But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v.

McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The "generating source" of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare *Tyler* v. *United States,* 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other *in consequence of the death which happens afterward.*' (Ital. added.) *Heiner* v. *Donnan,* 285 U. S. 312, 322-323 (pp. 41-2). * * *

After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility" (p. 43).

See, also, *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, and *Bingham* v. *United States*, 296 U. S. 211.

In *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, the Court dealt with that part of Section 302(d) of the Revenue Act of 1926 (*supra*, p. 3) taxing transfers in trust which were subject at the date of his death to any change through the exercise of a power by the decedent, in conjunction with any person, to alter, amend or revoke. The trust was made in 1930, *after the passage of the statute.** Referring to *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court said:

> "It was held that a gift beyond the power of the grantor to alter, amend or revoke could not be said to take effect in possession or enjoyment at or after his death. Conversely, one which he alone held the power to revoke or modify came within the section, since, at his death, substantial interests passed from his control and were for the first time confirmed in others. The case involved nothing more than a determination whether the transfers were complete when made. If they were the statute did not reach them (p. 88). * * *
>
> The section was first introduced into the Revenue Act of 1924, and reenacted in that of 1926. Mrs. James created her trust in 1930. She was, therefore, upon notice of the law's command, and there can be no claim that the statute is retroactive in its application to her transfer.
>
> The inquiry is whether it is arbitrary and unreasonable *to prescribe for the future* that, as

* In that case the trust deed reserved to the grantor the income for life. It was made in 1930, and she died May 22, 1931, after the passage of the Joint Resolution of March 3, 1931. The precise question in the case at bar was there presented, but the Government did not raise it.

> respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exercisable jointly with another (pp. 89-90) * * *.
>
> It was appropriate for Congress to prescribe that if, *subsequently to the passage of that Act,* the creator of a trust estate saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor" (p. 92). (Italics ours.)

In contrast with the *City Bank Farmers Trust Company* case is *Helvering* v. *Helmholz,* 296 U. S. 93. In 1918, *when there had been in force since 1916* an estate tax law taxing transfers "to take effect in possession or enjoyment at or after death," the decedent had transferred property in trust, reserving to herself the income for life. She died in 1927. The indenture provided that the trust might be terminated by the trustees, of whom the grantor was one, or by action of the board of directors of a named corporation, or on its dissolution, and if terminated during her life, the trust estate would revert to her. The questions decided were whether the provision of Section 302(d) of the Revenue Act of 1926, first appearing in the Revenue Act of 1924, taxing trusts containing a power to the grantor in conjunction with other persons, to revoke, alter or amend, should be construed to apply, and if so, whether, as applied to a trust made in 1918, it was valid. Although the Court was dealing with subdivision (d), the principle is applicable to subdivision (c). The Court held that it ought not to

be so construed, but if retroactive it would be invalid. It said:

> "Another and more serious objection to the application of § 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If § 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531" (pp. 97-8).

Though the Court was divided on the question of interpretation, it was unanimous on the point that applied to a transfer made before its passage, the statute was invalid.

White v. *Poor*, 296 U. S. 98, is similar, the trust having been made December 31, 1919, and the grantor having died in January 1931, and the Court said:

> "What has been said in the *Helmholz* case requires a ruling that the section, if held to apply to this transfer, offends the due process clause of the Fifth Amendment" (p. 102).

The principle established by the two cases last cited is that where a transfer is within the *penumbra* which lies between dispositions which are certainly testamentary and those which certainly are not, the power to classify by placing in the class of testa-

mentary dispositions those which the law has previously left untaxed, may not be exercised in respect of transfers previously made.

The only difference between those two cases and this is that a transfer of the sort here involved has less of the attributes of a testamentary disposition than the type considered in the *Helmholz* and *Poor* cases. Here it is an open question whether the transfer is even in the *penumbra*. There the transfer was of a sort which in *Helvering* v. *City Bank Farmers Trust Co., supra,* the Court held was in the twilight zone and could validly be taxed *prospectively* as a testamentary transfer.

In *Myers* v. *Magruder,* 15 Fed. Supp. 488, a case involving an irrevocable grant, reserving income for life, made in 1925, the grantor dying February 1, 1934, it was said:

> "But whatever doubt may have heretofore existed as to the validity of the retrospective taxing legislation here involved is completely dispelled by *Helvering* v. *Helmholz,* 296 U. S. 93, 56 S. Ct. 68, 80 L. Ed. 76, and *White* v. *Poor,* 296 U. S. 98, 56 S. Ct. 66, 80 L. Ed. 80, especially when read in connection with *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, 56 S. Ct. 74, 80 L. Ed. 29, 100 A. L. R. 1239; *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35, and *Helvering* v. *City Bank Farmers Trust Co., Trustee,* 296 U. S. 85, 56 S. Ct. 70, 80 L. Ed. 62, all decided on the same day, November 11, 1935" (p. 494).

The petitioner contends that a retroactive tax is not always in violation of the Fifth Amendment, but only if it is arbitrary, and that it is not so if at the time

of a transfer, the grantor was on notice or forewarned, that a statute might later be passed to include it, and cites cases sustaining retroactive taxes.

Income tax laws, in which the income for a year is the base, have been applied retroactively to income for the entire calendar year in which the law was passed, and income tax laws passed early in one year have been applied to the preceding calendar year. Cases of that type are, *Stockdale* v. *Insurance Companies,* 20 Wall. 323; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Lynch* v. *Hornby,* 247 U. S. 339, 343.

Cooper v. *United States,* 280 U. S. 409, on which the petitioner so much relies, is of the same type. The Revenue Act of 1921 was enacted November 23, 1921, imposing taxes on income for the entire calendar year 1921. It provided that the basis for computing gains on sales of property acquired by gift should be cost to the donor. The taxpayer received a gift on November 1, 1921, and sold the property November 7th, only two weeks before the act was approved. It is obvious that if Congress may tax income for the calendar year in which the taxing act is passed, it can and must at the same time prescribe the basis for computing income.

Hecht v. *Malley,* 265 U. S. 144, involved a corporation excise tax, based on a year's income. The tax was for the year ending June 30, 1919, imposed under the Revenue Act of 1918, the passage of which was delayed until February 24, 1919.

In *Reinecke* v. *Smith,* 289 U. S. 172, an income tax case, the Court said:

"Nor do we think the act has such a retroactive

effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440, and *Blodgett* v. *Holden,* 275 U. S. 142. In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction. In the present case the subject of the tax is not the creation of the trusts or the transfer of the *corpus* from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States,* 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379" (p. 175).

Third National Bank & Trust Co. v. *White,* 287 U. S. 577, dealt with a tenancy by the entirety, a peculiar estate, and is irrelevant. Cases such as *United States* v. *Heinszen & Co.,* 206 U. S. 370, are also distinguishable. Ours is not a case where taxes were imposed under laws clearly imposing them but afterwards held invalid. Duties on imposts into the Philippines had been imposed and collected by the Military Government and under later enactments by the Philippine Commission. It later developed that those authorities were wanting in power to enact the laws, and the Court sustained an Act of Congress ratifying their action in imposing the duties. On the other hand, in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, the Court held invalid a Florida statute ratifying unauthorized collection of canal tolls. Mr. Justice Holmes said:

"It is true that the doctrine of ratification has been carried somewhat beyond the point that we

indicate, in regard to acts done in the name of the Government by those who assume to represent it. *Tiaco* v. *Forbes,* 228 U. S. 549, 556. It is true also that when rights are asserted on the ground of some slight technical defect or contrary to some strongly prevailing view of justice, Courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions, some of which are collected in *Danforth* v. *Groton Water Co.,* 178 Mass. 472, 477. *Dunbar* v. *Boston & Providence R. R. Co.,* 181 Mass. 383, 385. In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine.

But Courts can not go very far against the literal meaning and plain intent of a constitutional text" (pp. 339-340).

See,

Graham & Foster v. *Goodcell,* 282 U. S. 409, 429.

In *Milliken* v. *United States,* 283 U. S. 15, the decedent, in December 1916, made a gift *in contemplation of death,* which was taxable on her death under the estate tax provisions of the Revenue Act in force when the gift was made. The Revenue Act passed in 1919 increased the rates, and the donor survived until March 5, 1920. The Court held that "a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time" was not arbitrary. As a gift in contemplation of death, like a gift *causa mortis,* is essentially a testamentary disposition, the situation was much the same as if she had made a will in 1916 and the rates had been changed before she died.

In *Porter* v. *Commissioner,* 288 U. S. 436, the trustor reserved to himself alone, the power to change

the beneficiaries and make any disposition he chose, of the income and *corpus* of the estate except for his own use. The transfer, during the life of the trustor, was completely ambulatory.

Other cases cited by petitioner are still farther afield.

The petitioner's argument that the taxpayer, in 1920, was forewarned of a statute passed eleven years later, seems to be built around the dissenting opinion in *Untermyer* v. *Anderson,* and the cases there cited, but the question there was whether a gift tax law enacted June 2, 1924, applying to all gifts during 1924, could validly be applied to a gift made only nine days before the act was passed, and after the bill had reached the stage where a conference report was awaiting action.

There is nothing in that opinion or in any other which even squints at stretching the doctrine of a forewarning of future enactments so as to apply it to an irrevocable transfer untaxed when made and completed beyond recall eleven years before a statute was passed to tax it. A Treasury ruling erroneously construing existing law gives no assurance that the Congress will change the law even prospectively to read as the Treasury thought it to be, *and still less gives any warning that the future legislation will be retroactive.*

The petitioner asserts (p. 29 Petitioner's Brief in No. 375) on the point that the decedent had reason to expect the enactment of the taxing statute, that *Helvering* v. *Helmholz, and White* v. *Poor, supra,* are to be "sharply distinguished" from this case. In the *Helmholz* case the trust was made in 1918. In *White*

v. *Poor,* the trust was made December 31, 1919. The provision relied on here to put the decedent on guard (the one covering transfers to take effect in possession or enjoyment at death) had been in force since 1916. So far as the face of that statute is concerned, was there not as much reason to anticipate a statute taxing a trust containing a provision for divesting the named beneficiaries by a termination of the trust, as to expect a statute to tax trusts reserving income for life? The first type of trust is more nearly a transfer to take effect at death than is the second.*

The petitioner depends largely, as a warning to the decedent, on former Treasury Regulations holding taxable as transfers to take effect on death, those reserving income for life, and yet no such Regulation was issued until August 14, 1919, Article 24, Regulations 37. Is a distinction to be made between those who made such trusts between 1916 and August 14, 1919,** and those who made them afterwards?

As far back as *Levy* v. *Wardell,* 258 U. S. 542, 544, decided May 1, 1922 (and earlier in the lower courts) doubt was being raised whether an irrevocable grant, reserving income for life, was a transfer to take effect on death. Certainly there was handwriting on the wall in *Nichols* v. *Coolidge, Reinecke* v. *Northern Trust Co.;* and *May* v. *Heiner.* Such transfers made in the light of those decisions, may well have been regarded by the grantors as free from tax under

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* Under the 1921 Revenue Act the Treasury claimed that a power to terminate, in conjunction with others, labeled a trust as one to take effect on death. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; see also Art. 24, Regulations 37, issued August 14, 1919; Art. 25, Regulations 37, issued January 31, 1921; Art. 21, Estate Tax Regulations, issued July 27, 1922.

** Such a case is *Whiting* v. *Commissioner,* 35 B. T. A. 100, now pending in C. C. A. 9th Circuit.

existing laws, as indeed they were. In the administration of the Acts of March 3, 1931, and 1932, hopeless confusion would follow an attempt to draw a distinction between trusts made before those decisions, and trusts made afterwards. The matter of notice or forewarning, relied on by the Government, would be governed by the situation and state of the decisions at the time each trust was made, and the case of each decedent would turn on its peculiar facts and circumstances.

In substance, the position of petitioner is that although the former Treasury Regulations, beginning August 14, 1919, were wrong, the taxpayer should have considered them right, and that the decision of this Court in *Burnet* v. *Northern Trust Co.* was so unwarranted, that the taxpayer should never have thought it possible. Why, after *Nichols* v. *Coolidge, Reinecke* v. *Northern Trust Co.*, and *May* v. *Heiner, supra,* anyone should have been surprised by the decision May 2, 1931, in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, it is hard to see.

In its brief in No. 375 (pp. 32-3) citing *Commissioner* v. *Chase National Bank,* 82 F. (2d) 157, the Government contends that where a decedent lived beyond the date of the Joint Resolution and Act of June 6, 1932, this retroactive tax is not arbitrary because he had notice of their provisions, and a chance to prevent the imposition of the tax by relinquishing his life estate. The same argument applies here, as Josephine B. Marshall survived until June 4, 1933, *but the petitioner overlooks the fact that from May 22, 1931, until long after she died the Regulations of the Treasury prescribed that the Joint Resolution and Act of 1932 were not applicable to her*

trust. Why should she make an attempt to rid her estate of a tax liability when existing Treasury Regulations assured her there would be none, and lulled her into security? The Government's argument merely confirms ours as to the injustice of overturning Regulations on which taxpayers have relied.

Furthermore, if, after March 3, 1931, Mrs. Marshall, then over seventy years of age and with death near, had relinquished her life estate, merely to avoid the tax, is there any doubt the Government would now be contending (with the two-year statutory presumption to support it) that her act was in contemplation of death and the surrender of her life estate failed of its purpose?

A transfer *inter vivos,* irrevocable, not made *causa mortis,* or in contemplation of death, and reserving only the income for life, is a vested gift when made, and without doubt could be then taxed as such. It is only because it is claimed that such a transfer has some attribute of a testamentary disposition, or a tendency to avoid estate taxes, that the right is claimed under the so-called *penumbra* doctrine, to classify it with true testamentary dispositions, under estate tax laws. See, *Milliken* v. *United States,* 283 U. S. 15, 20. There is much in the decisions of this Court running counter to the view that such transfers may be classified as testamentary and taxed *prospectively.* The Circuit Court of Appeals so held in *Bullard* v. *Commissioner,* 90 F. (2d) 144 (No. 349 this Term).

If treated as gifts, it is settled that such transfers cannot validly be taxed as such by a gift tax law

passed years after they are completed. May they be taxed retroactively by merely exercising the doubtful power to transfer them from one class to the other? *Heiner* v. *Donnan,* 285 U. S. 312, 331. Classification prospectively may be reasonable. Classification retrospectively may be, and in this case is, arbitrary and void. The distinction between such retroactive and prospective classifications was clearly drawn in *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, 90, 92.

It is arbitrary to tax retroactively the whole value of the property, including the remainder, when only the life estate is affected by the grantor's death. Certainly the remainder is not an interest which passes on death. *Knox* v. *McElligott,* 258 U. S. 546; *Griswold* v. *Helvering,* 290 U. S. 56.

The power to classify is strained to the verge, if not beyond it, by treating as testamentary, even prospectively, transfers such as are here involved. Laying aside cases where transfers are made to beat pending bills, the conclusion must be that *Helvering* v. *Helmholz,* and *White* v. *Poor, supra,* definitely settle the principle that a statute making such a classification cannot be applied to transfers made long before its passage, and that the mere possibility, not realized for years, that some day the Congress might enact such a measure, is not enough to take a case from under the rule. The only open question is the one reserved in *Burnet* v. *Northern Trust Co., supra.,* viz., whether such trusts may be prospectively classified as testamentary.

This Court has quoted with approval (*Shwab* v. *Doyle, supra*) Judge Story's statement that:

> "retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither

accord with sound legislation nor with the fundamental principles of the social compact."

Estate and gift taxation are fields in which the Federal Government has but recently entered. If proper estate tax laws, supplemented by proper gift tax laws, remain in effect for a time, the problems here presented would soon disappear. Because that situation has not existed, there is a temptation to reach back by retroactive laws and to tax transfers, completed long before. To gain a few millions in revenue, a mere drop in the bucket of annual expenditures, the salutary rule against retroactive legislation would be permanently undermined. Mr. Justice Holmes said in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 340:

> "To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot."

The judgment should be affirmed.

Respectfully submitted,

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GEORGE H. CRAVEN,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

Nos. 375, 484.—October Term, 1937.

Thomas B. Hassett, Individually and as Former Acting Collector, Petitioner, 375 *vs.* E. Sohier Welch, et al., Executors.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 484 *vs.* Charles H. Marshall, Administrator of the Estate of Josephine B. Marshall, deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners ask us to hold that Section 302 (c) of the Revenue Act of 1926[1] as amended by the Joint Resolution of Congress of March 3, 1931,[2] and Section 803 (a) of the Revenue Act of 1932,[3] includes in the gross estate of a decedent, for estate tax, property which, before the adoption of the amendments, was irrevocably transferred with reservation of a life estate to the transferor; and that, so applied, the statute does not offend the due process clause of the Fifth Amendment of the Constitution. The numerous cases pending in the courts and the Board of Tax Appeals involving these questions, and the claim that decisions of this court have not settled the matter, moved us to grant certiorari.

The respondents in No. 375 are executors under the will of a decedent who died November 20, 1932. On February 13, 1924, voluntarily and without valuable consideration, he transferred to a trustee property which he expected to receive under the will of his brother, reserving to himself the income for life, directing division of the income after his death between nephews and nieces and dis-

[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411 (c).
[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).
[3] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

tribution of the corpus, upon the death of the survivor of them, amongst their then living issue. After his brother's death, and on October 22, 1926, he duly ratified and confirmed the original trust instrument. The Commissioner ruled that the value of the trust assets should be included in the decedent's gross estate, in the view that the transfer was testamentary, because made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926. The respondents paid the resulting tax and sued for refund in the District Court of Massachusetts. Judgment went for the Collector.[4] The Circuit Court of Appeals held that the District Court erred in concluding that the transfer was made in contemplation of death or was intended to take effect in possession or enjoyment after death. The petitioner nevertheless insisted upon the legality of the exaction as the decedent died after the 1931 and 1932 amendments of Section 302 (c), which declared the property transferred a part of the gross estate for computation of estate tax, in virtue of the reservation to the transferor of the income for his life. The court overruled the contention, holding that, if so retroactively enforced, the legislation violated the Fifth Amendment of the Constitution, and reversed the judgment.[5] In his application for certiorari the petitioner did not assign error to the Circuit Court's ruling as to the nontestamentary character of the transfer but confined his attack to the decision that the amendments of Section 302 (c) could not constitutionally be invoked to sustain the tax.

In No. 484 it appears that the decedent died intestate June 4, 1933. The respondent, her son, is her administrator. November 15, 1920, she transferred to him certain cash and securities. On the same day they entered into an agreement reciting an understanding that, in case of his death during her life, the securities and cash should be reconveyed to her and, in the meantime, he should pay her such portions of the income therefrom as she might from time to time request in writing; that while he held the securities he might invest and reinvest; that he should bequeath her all the assets constituting the fund, in case she survived him; that she would reimburse him for any increased income taxes payable by

[4] 15 F. Supp. 692.
[5] 90 F. (2d) 833.

him in virtue of his ownership of the fund and that, if she should survive him and take the property under his will, she would reimburse his estate for state and federal inheritance taxes due by reason of the bequest. The agreement contained other provisions for the safeguarding and separate custody of the fund during the mother's life. The respondent paid the decedent portions of the income upon her request. He executed a will bequeathing the property to her on the terms mentioned in the agreement, but upon her death, he revoked the bequest. The Commissioner included the value of the fund in the decedent's gross estate, holding that she had made a transfer within the terms of Section 302 (c) of the Revenue Act of 1926, as amended in 1931 and 1932. The Board of Tax Appeals reversed the Commissioner's determination and the Court of Appeals affirmed its action[6] upon the authority of the decision of the Circuit Court of Appeals of the First Circuit in No. 375 and that of the Seventh Circuit in No. 349, decided this day.

Counsel for the Government argue that the Joint Resolution of 1931 and Section 803 (a) of the Revenue Act of 1932 were intended to impose an estate tax measured by transfers of the sort therein described which had been irrevocably made prior to the passage of the legislation and that, so construed, they are not arbitrarily or unreasonably retroactive and do not offend the due process clause of the Fifth Amendment. Counsel for respondents answer that the enactments were intended to operate only upon transfers subsequently consummated and, if construed to reach the past transfers here involved, violate the amendment. We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest.

Ascertainment of the intended application of the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, involves a reading of them in the light of cases construing similar phraseolgy of earlier acts, their legislative history and administrative interpretation. There is agreement that Section 803 (a) reenacted the substance of the Joint Resolution with but slight verbal differences. It will, therefore, be necessary to quote

[6] 91 F. (2d) 1010.

only the Resolution. By it Section 302 (c) of the Revenue Act of 1926, *supra*, was amended to provide:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —"

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death* (1) *the possession or enjoyment of, or the income from, the property or* (2) *the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

The matter in ordinary type is Section 302 (c) as it was prior to amendment; the additions are in italics.

The Government relies on the words "at any time" as demonstrating that the legislation was intended to apply to transfers made before its adoption and is so unequivocal as to leave no room for construction. This phrase, appearing in an earlier revenue act, had, however, been held not to render the statute effective upon transfers antedating the passage of the Act[7] and Congress apparently realized that the expression did not carry the statute back so as to embrace transactions consummated before its passage; for, in subsection (h) of Section 302 of the Act of 1926,[8] in referring to transactions and interests giving rise to a tax by virtue of preceding subsections, it directed that they should be taxable "whether made, created, arising, existing, exercised, or relinquished before or after the enactment *of this Act.*"[9] We conclude that the meaning of the section is not so free from doubt as to preclude inquiry concerning the legislative purpose.

The history of the Resolution is of material aid in its construction. Section 302 (c) of the Act of 1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of,

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[7] Shwab *v.* Doyle, 258 U. S. 529; Union Trust Co. *v.* Wardell, 258 U. S. 537; construing Sec. 202 of the Act of Sept. 8, 1916, 39 Stat. 777.

[8] 44 Stat. 71, U. S. C. Tit. 26, Sec. 411 (h).

[9] Compare Shwab *v.* Doyle, supra, at p. 536; Lewellyn *v.* Frick, 268 U. S. 238, 252.

or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition this court held otherwise.[10] Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed.[11] In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was "no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved . . ." There then remained one day of the current session of Congress. The Treasury drafted an amendment of Section 302 (c) to bring trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed, under a suspension of the rules, on the next day, the last of the session.[12]

Because its passage was considered exigent the Resolution was adopted without having been printed and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it."[13]

Mr. Hawley, of the same Committee, in charge of the Resolution, stated, in answer to a question: "It provides that hereafter no such method shall be used to evade the tax" and, referring to the situation created by the decisions of this court, he said:

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts

[10] May v. Heiner, 281 U. S. 238, construing § 402 (c) of the Revenue Act of 1918, 44 Stat. 1057, 1097.

[11] Burnet v. Northern Trust Co., 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783; McCormick v. Burnet, 283 U. S. 784, construing § 402 (c) of the Revenue Act of 1921 and § 302 (c) of the Revenue Act of 1924.

[12] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.

[13] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198-7199.

or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

This language, we think, scarcely bears the interpretation put upon it by Government counsel,—that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the administrative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage. Promptly upon its passage the Department issued T. D. 4314,[14] approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the resolution and stated:

"In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge*, (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner*, (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, jr.* v. *Burnet*, (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court." (Italics in the original.)

April 11, 1932, Regulations 70 were amended by T. D. 4336 and, in part, read:

"Art. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 p. m., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth."

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[14] C. B. X-1, 450.

Not only is the legislative history of Section 803 (a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought.[15] Moreover, the reenactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reenacted.[16]

Regulations 80, approved November 7, 1934, after paraphrasing section 803 (a), concluded: "The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932 [The date of passage of the Revenue Act of 1932]. See section 506 of the Revenue Act of 1934." This regulation was retained as Article 18 in the 1937 edition of Regulations 80 issued October 26, 1937. Thus while the regulations have been altered to treat Section 803 (a) of the 1932 Act as retroactively affecting transfers made after March 3, 1931, the Department has consistently ruled that the Resolution of 1931 has no application to transfers made prior to its adoption. The position thus recently taken is inconsistent in its treatment of the two like enactments and is difficult to understand in view of the consistent interpretation of the Joint Resolution but it fails to weaken the force of that consistent interpretation with knowledge of which Congress reenacted the same provision in 1932.

The Government urges that all of these circumstances which are persuasive that the enactments were intended to operate for the future are overborne by Section 302 (h) of the Revenue Act of 1926, which is:

"Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the

[15] The reports of the Committees of both House and Senate contain this statement: "The purpose of this amendment to section 302 (c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect" (House Committee Report No. 708, 72nd Cong., 1st Sess.; Senate Committee Report No. 665, same session).

[16] Brewster *v.* Gage, 280 U. S. 327, 337; United States *v.* Dakota-Montana Oil Co., 288 U. S. 459, 466; McFeely *v.* Commissioner, 296 U. S. 102, 108; United States *v.* Safety Car Heating Co., 297 U. S. 88, 95.

transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, *as severally enumerated and described therein*, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of *this* Act." (Italics supplied.)

It will be remembered that the Joint Resolution of 1931 amended Section 302 (c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that Act. Since Section 302 (c) in its original form was, by Section 302 (h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.

Resort is had to canons of constructions as an aid in ascertaining the intent of the legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case. The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A well-settled canon tends to support the position of respondents: "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."[17] The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.[18]

In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;[19] that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved

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[17] Lewis' Sutherland on Statutory Construction, 2d Ed., Vol. II, pp. 787-8.

[18] Calumet Foundry & Machine Co. v. Mroz, 79 Ind. App. 305; State v. Beckner, 197 Iowa 1252; Crohn v. Telephone Co., 131 Mo. App. 313; Gustafson v. Hammond Irrigation Dist., 87 Mont. 217; Flanders v. Merrimack, 48 Wis. 567; *contra*, American Bank v. Goss, 236 N. Y. 488.

[19] United States v. Heth, 3 Cranch 399, 413; Reynolds v. McArthur, 2 Pet. 417, 434; Shwab v. Doyle, 258 U. S. 529; United States v. Magnolia Petroleum Co., 276 U. S. 160, 162.

in favor of the taxpayer,[20] we feel bound to hold that the Joint Resolution of 1931 and Section 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively.

Holding this view, we need not consider the contention that the statutes as applied to the transfers under consideration deprive the respondents of their property without due process in violation of the Fifth Amendment.

The judgments are

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[20] Gould *v.* Gould, 245 U. S. 151; Shwab *v.* Doyle, *supra;* Reinecke *v.* Northern Trust Co., 278 U. S. 339, 348; White *v.* Aronson, 302 U. S. 16.